No. 15-789

Title:	Deborah K. Johnson, Warden, Petitioner
	v.
	Donna Kay Lee
Docketed:	December 17, 2015
Linked with 15A484	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(12-56258)
Decision Date:	June 9, 2015
Rehearing Denied:	August 17, 2015

---Date---	-------Proceedings and Orders----------
Nov 2 2015	Application (15A484) to extend the time to file a petition for a writ of certiorari from November 15, 2015 to December 15, 2015, submitted to Justice Kennedy.
Nov 5 2015	Application (15A484) granted by Justice Kennedy extending the time to file until December 15, 2015.
Dec 15 2015	Petition for a writ of certiorari filed. (Response due January 19, 2016)
Jan 15 2016	Order extending time to file response to petition to and including February 18, 2016.
Jan 19 2016	Brief amici curiae of Alabama, et al. filed.
Jan 19 2016	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Feb 11 2016	Order further extending time to file response to petition to and including March 21, 2016.
Mar 17 2016	Brief of respondent Donna Kay Lee in opposition filed.
Mar 17 2016	Motion for leave to proceed in forma pauperis filed by respondent Donna Kay Lee.
Apr 4 2016	Reply of petitioner Deborah K. Johnson, Warden filed.
Apr 6 2016	DISTRIBUTED for Conference of April 22, 2016.
Apr 25 2016	DISTRIBUTED for Conference of April 29, 2016.
May 9 2016	DISTRIBUTED for Conference of May 12, 2016.
May 16 2016	DISTRIBUTED for Conference of May 19, 2016.
May 23 2016	DISTRIBUTED for Conference of May 26, 2016.
May 31 2016	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
May 31 2016	Petition GRANTED. Judgment REVERSED and case REMANDED for further proceedings consistent with this opinion. Opinion per curiam. (Detached Opinion)
Jul 5 2016	JUDGMENT ISSUED

15-789

No. _____

In the Supreme Court of the United States

DEBORAH K. JOHNSON, WARDEN, *Petitioner*,

v.

DONNA KAY LEE, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

California courts, like federal courts and those of many other States, generally will not consider a claim on habeas corpus if the habeas petitioner could have raised the claim on direct appeal but failed to do so. The decision below holds that procedural default under this common rule was not an "adequate" state-law ground for rejecting habeas claims, because the State did not demonstrate "consistent" application of the rule by providing a full analysis of thousands of state cases in which it either was or could have been applied. The questions presented are:

1. Whether, for federal habeas purposes, California's procedural rule generally barring review of claims that were available but not raised on direct appeal is an "adequate" state-law ground for rejection of a claim.

2. Whether, when a federal habeas petitioner argues that a state procedural default is not an "adequate" state-law ground for rejection of a claim, the burden of persuasion as to adequacy rests on the habeas petitioner (as in the Fifth Circuit) or on the State (as in the Ninth and Tenth Circuits).

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of California, on behalf of warden Deborah Johnson, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-20a) is reported at 788 F.3d 1124. A previous opinion of that court (App. 72a-74a) is unpublished, as are the most recent opinion of the district court denying habeas relief (App. 21a-25a), the related report and recommendation of the magistrate judge (App. 26a-71a), an earlier opinion of the district court (App. 75a-76a), and the magistrate's report related to that opinion (App. 77a-130a). The orders of the California Supreme Court (App. 131a), the California Court of Appeal (App. 132a-133a), and the Superior Court for Los Angeles County (App. 134a-135a) denying Lee's state habeas petitions are also unpublished, as are the opinion of the California Court of Appeal affirming Lee's conviction (App. 137a-162a) and the order of the California Supreme Court denying review on direct appeal (App. 136a).

JURISDICTION

The judgment of the court of appeals was originally entered on June 9, 2015. The court reentered

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[1] Deborah Johnson has succeeded Debra Jacquez as warden of the state prison in which respondent Lee is incarcerated. Warden Johnson is substituted as the named petitioner in this case in compliance with this Court's Rule 35.3.

judgment when it denied rehearing en banc on August 17, 2015. On November 5, 2015, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including December 15, 2015. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides, in pertinent part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> * * *
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated

> on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

Many States, and the federal courts, apply a procedural rule under which courts generally will not consider, on post-conviction collateral review, claims that a defendant could have raised on direct appeal but did not. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350-351 (2006). In California this rule is known as the *Dixon* rule, after *In re Dixon*, 41 Cal. 2d 756 (1953). Like most rules, it is subject to limited exceptions. *See In re Harris*, 5 Cal. 4th 813 (1993).[2]

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[2] *See In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) (explaining that *Harris* exceptions apply to *Dixon* rule). The exceptions allow review of an otherwise defaulted claim: (1) where "the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process," *Harris*, 5 Cal. 4th at 834 (citing federal rule for structural error under *Arizona v. Fulminante*, 499 U.S. 279 (1991)); (2) where there was an unwaivable lack of "fundamental" (*i.e.*, subject matter) jurisdiction in the trial court that issued the judgment of conviction, *id.* at 836-838; (3) where the court imposed a sentence in "'excess of jurisdiction'" in a way that can be reviewed as a "strictly legal issue," *id.* at 838-841; or (4) where "a new rule of law" created between the time of direct appeal and the time of post-

(continued...)

On federal habeas review, the federal courts generally will not review a claim rejected by a state court if the state rejection rests on an adequate and independent state-law ground, such as a state procedural default. *See, e.g., Walker v. Martin*, 562 U.S. 307, 315 (2011). To be "adequate" for these purposes, a state procedural default rule must be "firmly established and regularly followed." *Id.* at 316 (internal quotation marks omitted). Here, the court of appeals held that California's *Dixon* rule was not an "adequate" ground for the state courts' rejection of respondent Lee's claims because the State did not prove to the federal court's satisfaction "the consistency of the rule's application." App. 18a. The decision below accordingly directs the district court to consider *de novo* on federal habeas review constitutional claims that respondent failed, without any apparent excuse, to present to the state courts on direct appeal.[3]

1. Respondent Lee and her boyfriend stabbed the boyfriend's mother and ex-girlfriend to death in front of the ex-girlfriend's two-year-old son. App. 83a, 138a-146a. In 1998, Lee was convicted of two counts of first degree murder with special circumstances and sentenced to life imprisonment without parole. *Id.* at 138a.

Lee raised four claims on direct appeal. App. 78a. The state court of appeal considered those claims and affirmed (App. 137a-162a), and in Decem-

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(...continued)
conviction review would affect the petitioner's case, *id.* at 841.

[3] As the court of appeals noted, "Lee has not asserted good cause for her default, nor has she claimed that a fundamental miscarriage of justice would occur absent consideration of her claim." App. 7a n.4.

ber 2000 the state supreme court denied review (*id.* at 136a).

Lee then filed a federal habeas petition. Her federal petition raised not only the claims she had advanced on direct appeal, but also more than ten new claims. App. 79a.[4] The district court stayed the federal proceeding so that Lee could present the new claims to the state courts. *Id.*

The state superior court denied Lee's new state habeas petition, relying in part on *In re Dixon*. App. 134a-135a. The state court of appeal also rejected her petition. *Id.* at 132a. The California Supreme Court denied Lee's petition on December 1, 2004, in a summary order stating: "Petition for writ of habeas corpus is DENIED. (See *In re Waltreus* (1965) 62 Cal.2d 218; *In re Dixon* (1953) 41 Cal.2d 756; *In re Seaton* (2004) 34 Cal.4th 193.)" App. 131a.[5]

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[4] The claims which Lee had presented on direct appeal challenged evidentiary rulings, the denial of Lee's severance motion, the denial of Lee's requested provocation instruction, and the constitutionality of California's lying-in-wait special circumstance. *See* App. 78a, 93a. Lee's newly added claims eventually included an objection to the fact that Lee's counsel and her codefendant's counsel shared office space; complaints that adverse evidentiary rulings effectively gave her no choice but to testify; allegations that she was punished for rejecting plea offers; objections to the prosecution's evidence on aiding and abetting; an allegation that Lee was assaulted by a deputy during jury deliberations; a claim that a juror "'nodded off'" during trial; a claim that her jury was tainted because two jurors were asked, in a public restroom, what case they were seated on; objections to Lee's arrest and interrogation; a claim that female jurors were systematically excluded; a complaint about a juror's comment during trial; and a challenge regarding her codefendant's statement. *Id.* at 79a-81a, 94a-95a.

[5] *Waltreus* bars relitigation on state habeas of claims that *were* raised on direct appeal. *See Harris*, 5 Cal. 4th at 825. On federal habeas, Lee eventually claimed that the state supreme court's citation to *Waltreus* pertained to two of her

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2. a. Returning to federal court, Lee again sought to raise both the four claims she originally presented on direct appeal and the many others that the state courts had now rejected as procedurally barred under *Dixon*. App. 93a-95a. A magistrate judge and the district court considered and rejected the four non-defaulted claims. *Id.* at 105a-129a; *id.* at 75a-76a. The other claims, they held, could not be considered on federal habeas because the state court judgments rejecting them rested on the adequate and independent state-law ground of the *Dixon* bar. *Id.* at 98a-104a; *id.* at 75a-76a.

In 2010, the court of appeals affirmed as to the properly presented claims, but vacated as to the claims defaulted under *Dixon*. App. 72a-74a. It directed the district court to consider whether the *Dixon* rule was consistently enough applied to be an "adequate" state-law ground. *Id.* at 74a. As explanation, the court cited its decision in *Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir. 2003), which had considered the "adequacy" of California's flexible timeliness rule for the filing of state habeas petitions. *See* App. 74a. *Bennett* established a three-step, burden-shifting framework under which the State bears the ultimate burden of establishing the "adequacy" of its procedural bar rules. *See id.* at 8a.

b. On remand, Lee argued that the *Dixon* bar was not "adequa[te]" for federal habeas purposes because the state courts did not consistently apply it. *See* App. 54a. She proffered an order list setting forth 210 California Supreme Court habeas denials issued on a single day (chosen without explanation) six months after the filing of her direct appeal: December 21, 1999. *Id.* Although 10% of the denials

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claims, while the *Dixon* citation applied to the others. App. 45a.

were based on *Dixon*, Lee asserted that there were many cases where the state court did not invoke the *Dixon* bar even though the petitions presented record-based claims that could have been raised on direct appeal but were not. *Id.* at 65a. As the magistrate judge observed, this assertion primarily rested on Lee's "unsupported speculation" that many "'primarily non-capital'" habeas petitioners "'would likely'" have "'thrown into a petition'" record-based claims that could have been brought earlier and thus should have been barred under *Dixon*. *Id.* Lee also argued that, among the California Supreme Court's 210 habeas denials that day, there were nine specific cases that Lee said were "'denied on the merits'" but where *Dixon* could have applied as a procedural bar. *Id.* at 55a.

In response, the State provided evidence that, during approximately two years surrounding the filing of the direct-appeal brief in which Lee failed to raise the claims at issue, the California Supreme Court decided some 4,700 habeas petitions, of which approximately 12% involved denials of relief based on *Dixon*. App. 61a. The rate of dismissals invoking *Dixon* over this time was consistent, ranging from ten to fifteen percent. *Id.* Regarding Lee's nine specific cases from December 21, 1999, the State observed that several of those cases would not have been subject to *Dixon* because they involved claims of ineffective assistance of counsel, which could not have been raised on direct appeal. *Id.* Several others involved defendants who had pleaded guilty, which would have limited their direct appeal possibilities (and thus *Dixon*'s applicability) as well. *Id.*

The magistrate judge recommended rejecting Lee's challenge, relying largely on *Walker v. Martin*, 562 U.S. 307 (2011). App. 63a-66a. Decided after the remand order in this case, *Martin* reversed the Ninth

Circuit's determination of inadequacy regarding the state habeas timeliness rule that had been at issue in *Bennett*—the case the court of appeals cited in its remand order here, and in which it adopted its burden-shifting framework for analyzing "adequacy" claims. In assessing Lee's argument that the *Dixon* bar was not consistently applied, the magistrate judge considered *Martin*'s holding that there was "'no reason to reject California's time bar simply because a [state] court may opt to bypass the [timeliness] assessment and summarily dismiss a petition on the merits, if that is the easier path.'" App. 66a (quoting *Martin*, 562 U.S. at 319). He also noted this Court's approval of state rules allowing for the "'appropriate exercise of discretion.'" *Id.* (quoting *Beard v. Kindler*, 558 U.S. 53, 61 (2009)). Noting that Lee did "not contend that 'the California Supreme Court exercised its discretion in a surprising or unfair manner,'" *id.* (quoting *Martin*, 562 U.S. at 320), the magistrate concluded that the *Dixon* bar was "well established and regularly followed" during "the time leading up to petitioner's default," *id.*, and thus adequate to preclude federal habeas review.

After reviewing the evidence, the district court adopted the magistrate judge's recommendation and dismissed Lee's claims. App. 21a-25a.

c. The court of appeals reversed. App. 1a-20a.

The court first recited an "adequacy" standard drawn from its own cases: "In order to be adequate, a procedural bar must be 'clear, consistently applied, and well-established at the time of the petitioner's purported default.'" App. 7a. The court equated that standard with this Court's articulation that a state procedural rule must be "'firmly established and regularly followed.'" *Id.* at 8a (quoting *Martin*, 562 U.S. at 316).

The court then reiterated the burden-shifting framework it had adopted in *Bennett*. App. 8a. If the State "plead[s] the existence of an independent and adequate state procedural bar as an affirmative defense" to a habeas claim, the habeas petitioner may "'assert[] specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule.'" *Id.* This burden of "put[ting] adequacy at issue," the court made clear, is "'modest.'" *Id.* Once that is done, "the burden shifts back to the State, which must carry 'the ultimate burden of proving the adequacy of [a] ... state procedural bar' as an affirmative defense." *Id.* Here, the court accepted Lee's partial analysis of nine habeas denials issued by the California Supreme Court on one day as meeting her burden, thus leaving the case "at the final stage of *Bennett*'s framework, where the state must prove the *Dixon* bar's adequacy" *Id.* at 9a; *see also id.* at 18a-19a (rejecting challenge to Lee's analysis).

The court next rejected the State's argument that, under *Martin*, "any inconsistency in *Dixon*'s application reflects only the state's exercise of discretion rather than the rule's inadequacy." App. 11a. It reasoned that the timeliness rule at issue in *Martin* was "inherently discretionary in its initial application, while the *Dixon* rule is mandatory in the first instance." *Id.* The state courts thus "should be able to apply the *Dixon* bar mechanically and consistently," and a court's failure to cite it where it might have been applied "reflects the irregular application of the rule." *Id.* In the court's view, this required that the state do more to "prove the *Dixon* rule's regular and consistent application around the time of Lee's default." *Id.* at 13a.

In that regard, the court acknowledged that it had not "'defin[ed] what is a statistically insignificant irregularity and inconsistency in the application of a state procedural bar.'" App. 14a. It suggested that the state "need not necessarily" show reliance on the rule "in the vast majority of cases." *Id.* It noted, however, that *Bennett* "advises the state to provide 'records and authorities'" to sustain its burden, which "suggests that the state should do more than just discredit the [habeas] petitioner's evidence." *Id.* at 15a (quoting *Bennett*, 322 F.3d at 585). The court also regarded the development of the law in the state courts over time as evidence "that the *Dixon* bar was applied inconsistently until at least September 30, 1993, when the California Supreme Court decided *Harris* to 'provide needed guidance,'" and possibly thereafter as the cases continued to develop. *Id.*

Here, the court held that the State's analysis of approximately 4,700 California Supreme Court habeas denials over a two-year period surrounding Lee's default, showing invocation of the *Dixon* bar in approximately 12% of all cases and a range of 7% to 21% from month to month, was "entirely insufficient." App. 17a. Although these figures showed regular invocation of the bar, the court reasoned that they did not prove "consistent" application, because they did not show "to how many cases the *Dixon* bar *should* have been applied." *Id.* Without "the denominator that would give any meaning to the state's number," the 12% invocation rate "in no way indicate[d] the consistency of the rule's application." *Id.* at 18a. In its assessment, the court made clear, it would count against the State any case in which "'claims to which the *Dixon* rule could apply were instead rejected on the merits,'" *id.* at 17a, as well as any unexplained denial of relief unless the State specifically identified, on a case-by-case basis, those

"cases in which a silent denial relied on a prior invocation of *Dixon*," *id.* at 18a.

Applying these principles and its own formulation of the "adequacy" test, the court of appeals held that the State had "failed to meet its burden of proving that the *Dixon* bar was 'clear, consistently applied, and well-established at the time of [Lee's] purported default.'" App. 19a. The court did not advert again to this Court's statement of the test, that a bar must be "firmly established and regularly followed." *Compare id.*, *with Martin*, 562 U.S. at 377 (internal quotation marks omitted).

REASONS FOR GRANTING CERTIORARI

Twice in recent years this Court has reversed decisions holding state procedural bars "inadequate" for purposes of federal habeas review. *Walker v. Martin*, 562 U.S. 307 (2011); *Beard v. Kindler*, 558 U.S. 53 (2009). The result should be the same here. The decision below demands "mechanical[]" consistency in the application of a state rule (App. 11a), rather than respecting the ability of the state courts to exercise discretion, including ruling on the merits where it is more efficient to do so. It thus declines to treat as "adequate" for federal purposes a state procedural bar that is not only longstanding and sensible in its own right but also commonly used in other States and, indeed, by the federal courts themselves.

That result cannot be reconciled with this Court's precedents or with any sound understanding of the purpose of the "adequacy" inquiry or the proper role of federal habeas review. These issues are of great importance, because state procedural bars are properly invoked as to many claims in federal habeas proceedings, and enforcing them is critical to the proper operation of both the state and the federal judicial systems. In requiring the State to prove ade-

quacy, rather than requiring a habeas petitioner to show that a facially proper state-law ground for judgment is *in*adequate, the decision below also reflects a square conflict among the courts of appeals. And because the state rule at issue here is a "typical procedural default," this case would be a "[]suitable vehicle for providing broad guidance on the adequate state ground doctrine." *Kindler*, 558 U.S. at 63.

1. "A federal habeas court will not review a claim rejected by a state court 'if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Kindler*, 558 U.S. at 55. "To qualify as an 'adequate' procedural rule, a state rule must be 'firmly established and regularly followed.'" *Martin*, 562 U.S. at 316. The requirement that a rule be "regularly followed" ensures that application of a bar in a particular case is not "surprising or unfair," and does not "operate to discriminate against claims of federal rights." *Id.* at 320-321, *see also id.* at 320 n.7 (reviewing holdings showing that "seeming inconsistencie[s]" are unobjectionable if differences are not "arbitrar[y] or irrationa[l]" (internal quotation marks omitted)); *Kindler*, 558 U.S. at 63-64 (Kennedy, J., concurring) (adequate state ground doctrine must be applied in light of its purposes, including providing "adequate notice to litigants" and avoiding "the danger that novel state procedural requirements will be imposed for the purpose of evading compliance with a federal standard").

Here, there has been no contention that the California courts apply the *Dixon* default rule in any surprising or unfair manner as a general matter, or that they did so in this case. *See* App. 66a. The court of appeals instead held that it would not respect the bar as an adequate state ground for decision because

the State did not prove that state courts apply the bar "consistently," which it understood to mean "mechanically." App. 11a. That approach cannot be squared with the purposes of the standard or with this Court's decisions in *Martin* and *Kindler*.

Martin considered the adequacy, for federal habeas purposes, of the California rule requiring post-conviction claims to be brought "'as promptly as the circumstances allow.'" 562 U.S. at 310. In that case the Ninth Circuit, applying the same burden-shifting framework from its *Bennett* decision that it reaffirmed in this case, held that California's rule was inadequate because of the discretion it afforded state courts, and potential inconsistency in the results in individual cases.[6] This Court unanimously reversed, holding that "[a] rule can be firmly established and regularly followed ... even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." 562 U.S. at 316 (internal quotation marks omitted). Indeed, "'[s]ound procedure often requires discretion to exact or excuse compliance with strict rules,' and [the Court had] no cause to discourage standards allowing courts to exercise such discretion." *Id.* at 320 (citation omitted).

The *Martin* Court also saw "no reason to reject California's time bar simply because a [state] court may opt to bypass the [timeliness] assessment and summarily dismiss a petition on the merits, if that is the easier path." 562 U.S. at 319. Moreover, noting the existence of federal procedural rules similar to the state rule at issue, this Court reiterated that federal habeas analysis should not "'disregard state pro-

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[6] *See Martin v. Walker*, 357 Fed. App'x 793, 794 (9th Cir. 2009) (following *Townsend v. Knowles*, 562 F.3d 1200, 1206-1208 (9th Cir. 2009), which held the rule inadequate under *Bennett*).

cedural rules that are substantially similar to those to which we give full force in our own courts.'" *Id.* at 318 (quoting *Kindler*, 558 U.S. at 62). Noting the absence of any contention that the California Supreme Court "exercised its discretion in a surprising or unfair manner," *id.* at 320, or that the rule "either by design or in operation[] discriminate[d] against federal claims or claimants," *id.* at 311, this Court upheld the "adequacy" of the rule.

Here, the court of appeals sought to distinguish *Martin*'s tolerance of the variation that may result from discretionary application. It reasoned that *Martin* "focused its analysis on the discretion inherent in the timeliness bar's initial application, rather than on the application of the bar's exceptions," whereas "even if courts must exercise discretion when applying *Dixon*'s exceptions, this analysis occurs only after *Dixon* has first been applied." App. 12a. In assessing, however, whether a rule is being applied fairly and regularly as opposed to arbitrarily, it makes no difference whether courts exercise discretion "inherent" in the rule itself or, instead, in deciding whether or exactly how to apply it. *Martin* expressly recognizes that "'[s]ound procedure often requires discretion to exact *or excuse* compliance with strict rules.'" 562 U.S. at 320 (emphasis added). And *Kindler* emphasizes that federal habeas law should not force States into the "unnecessary dilemma" of choosing between providing their courts with the "discretion *to excuse* procedural errors" and "preserv[ing] the finality of their judgments." *Kindler*, 558 U.S. at 61 (emphasis added).

The court of appeals also made clear that, in assessing whether a state procedural rule is "inadequate" for federal purposes because it is "inconsistently" applied, it would count against the State any case in which a state court dismissed a

claim on the merits when it *could* instead have invoked a *Dixon* bar. *See* App. 17a. The court faulted the State's evidence of regular application for not looking behind every case in which the California Supreme Court denied habeas relief in a summary order to see whether it could ascertain or surmise a *Dixon* basis for the ruling. *Id.* at 18a. Yet *Martin* expressly held, in the context of the State's bar on untimely habeas petitions, that there was "no reason to reject" the time rule as "inadequate" in cases in which it *was* applied, simply because the state courts were free to "to bypass the [timeliness] assessment and summarily dismiss a petition on the merits, if that is the easier path." 562 U.S. at 319. The reasoning of the decision below is flatly inconsistent with that holding.

Finally, the decision below ignores this Court's repeated warning that federal habeas courts should not "'disregard state procedural rules that are substantially similar to those to which we give full force in our own courts.'" *Martin*, 562 U.S. at 318 (quoting *Kindler*, 558 U.S. at 62). Under federal law, as in California, a defendant who fails to raise an available claim on direct appeal is generally barred from raising it for the first time later, on collateral review. *See Sanchez-Llamas*, 548 U.S. at 350-351 (citing *Massaro v. United States*, 538 U.S. 500 (2003), and *Bousley v. United States*, 523 U.S. 614 (1998)); *Sunal v. Large*, 332 U.S. 174, 178 (1947). Like California's *Dixon* rule, the federal rule is subject to exceptions. *Sunal*, 332 U.S. at 178; *see, e.g.*, *Bousley*, 523 U.S. at 622-624. But that does not make it any less the general rule.[7]

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[7] Federal courts may also, like state courts, bypass procedural questions when it is more efficient to dismiss a postconviction claim on the merits. *See* 28 U.S.C. § 2254(b)(2); *Lambrix*

(continued...)

A "proper constitutional balance ought not give federal courts latitude in the interpretation and elaboration of [federal] law that it then withholds from the States." *Kindler*, 558 U.S. at 65 (Kennedy, J., concurring); *see generally Coleman v. Thompson*, 501 U.S. 722, 746 (1991) ("a proper respect for the States require[s] that federal courts give to the state procedural rule the same effect they give to the federal rule"). Divergence from that principle, as in the decision below, raises significant questions about whether a federal court is according its state counterparts due respect.[8]

2. The decision below also reaffirms the court of appeals' position that the State bears the burden of proving that a state procedural rule is "adequate" for federal habeas purposes—even where the rule is a common one that clearly promotes valid interests, and the habeas petitioner has adduced no evidence that the rule has been applied in some unfair or surprising manner or that it discriminates in any way

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(...continued)

v. Singletary, 520 U.S. 518, 525 (1997). In addition to ignoring such parallel federal rules, the court below also failed to consider that rules similar to *Dixon* operate in many other States. *See* p. 23-25 & n.14, *infra*; *cf. Kindler*, 558 U.S. at 62.

[8] *See* recording of oral argument (Nov. 17, 2014), available at http://www.ca9.uscourts.gov/media/view.php?pk_id=0000013497, at 22:00-23:27 (judge theorizing that state-court prosecutions lead to more postconviction proceedings than federal prosecutions do, because state judges feel "no fixed individual responsibility"; if they "mess up," they will have transferred to another department before case returns to their court); *id.* at 24:15-24:21 (judge's comment that "the states aren't doing their job—they're giving the work to the federal courts"); *id.* at 29:38-30:30 (judge's complaint that state prosecutors do not handle cases as carefully as federal prosecutors and are less "selective" about bringing "good" cases); *cf. id.* at 24:25 ("the Great Writ" has become "the great joke").

against federal claims. That reaffirmation solidifies a recognized conflict among the courts of appeals. *See McNeill v. Polk*, 476 F.3d 206, 219-220 (4th Cir. 2007) (King, J., concurring in part) (discussing different approaches).

In the Fifth Circuit, a state procedural rule is "presume[d]" adequate. *Sones v. Hargett*, 61 F.3d 410, 416 (5th Cir. 1995). A habeas petitioner who argues that the application of the bar does not provide an "adequate" state ground for the rejection of a federal claim by the state courts in his or her case "bears the burden of proving that [the State] did not apply the doctrine with sufficient strictness and regularity during the relevant time period." *Emery v. Johnson*, 139 F.3d 191, 201 (5th Cir. 1997).

In the Ninth and Tenth Circuits, however, "the state bears the burden of proving the adequacy of a state procedural bar." *Hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir. 1999); App. 8a. The Tenth Circuit, like the Ninth, implements this rule through a three-step burden-shifting framework. "Once the state pleads the affirmative defense of an independent and adequate state procedural bar, the burden to place that defense in issue shifts to the [habeas] petitioner." *Hooks*, 184 F.3d at 1217 The challenger must make, "at a minimum, ... specific allegations ... as to the inadequacy of the state procedure." *Id.* If the challenger succeeds in putting the matter fairly at issue, the ultimate burden of persuasion shifts to the State. "The scope of the state's burden," however, is "measured by the specific claims of inadequacy put forth by the petitioner." *Id.*

As this case confirms, the Ninth Circuit has adopted the Tenth Circuit's basic framework. *See Bennett*, 322 F.3d at 585 (following *Hooks*); App. 8a. It has, however, modified that framework to increase the State's burden in two ways. First, the Ninth Cir-

cuit specifies that a habeas petitioner need make only a "'modest'" allegation of inadequacy to trigger the State's burden of proof—as, indeed, this case well illustrates. App. 8a. Second, although the decision below recites that, as under *Hooks*, the State's burden is "'measured by the specific claims of inadequacy put forth by the petitioner'" (*id.* at 15a), in practice it makes clear that the amount and kind of proof the court will demand from the State is not meaningfully tied to or limited by the challenger's specific showing. Simply "discredit[ing] the [habeas] petitioner's evidence" is not enough. *Id.*; *see also King v. LaMarque*, 464 F.3d 963, 967-968 (9th Cir. 2006) (State's "ultimate burden" remains the same "whether or not the petitioner identifies the correct basis upon which to challenge the adequacy of the rule").[9]

As this case demonstrates, placing the burden of proving "adequacy" on the State can subject the State to a litigation demand grossly disproportionate to the purposes, and proper starting presumptions, of the inquiry. Lee claimed she should be exempt from following *Dixon* because, on a single day (which she chose for comparison with no explanation, *see* App. 54a), the California Supreme Court denied state

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[9] Other circuits have adopted no clear burden-placing rule. *See McNeill*, 476 F.3d at 219 (King, J., concurring in part) (Fourth Circuit has not "squarely address[ed]" the issue, and implications of its decisions "are not entirely compatible" with each other); *Risdal v. Iowa*, 243 F. Supp. 2d 970, 973 (S.D. Iowa 2003) ("it does not appear that the Eighth Circuit ... has addressed this issue"); *compare Cotto v. Herbert*, 331 F.3d 217, 238 n.9 (2d Cir. 2003) ("assum[ing] without deciding that the state bears the burden of proving the adequacy of the state procedural rule") *with Larrea v. Bennett*, 2002 WL 1173564, at *12 & n.14 (S.D.N.Y. 2002) (reading *Wedra v. Lefevre*, 988 F.2d 334, 340 (2d Cir. 1993), as "impl[ying] that the [habeas] petitioner had the burden of proving inadequacy").

habeas relief in nine cases, out of a total of 240 such denials that day, in which she said the court could have invoked *Dixon* but instead ruled on other grounds. Under the decision below, that perfunctory showing imposed on the State a heavy burden to prove the "adequacy" of its procedural rule. The court of appeals all but directed the State, as the price of federal respect for a common procedural bar rule, to review the case files of thousands of habeas dispositions and establish for each case whether the state court could and should have applied the *Dixon* bar rule rather than ruling on whatever other ground it did. *See* App. 17a-18a.

That requirement departs completely from any sound model of federal habeas review. The California Supreme Court "rules on a staggering number of habeas petitions each year." *Martin*, 562 U.S. at 312-313.[10] Many are decided in summary orders—a salutary practice that "enable[s] a state judiciary to concentrate its resources on the cases where opinions are most needed." *Harrington v. Richter*, 562 U.S. 86, 99 (2011). A brief dispositive order may cite precedents showing that a procedural bar was found to apply. Indeed, the State's evidence here showed that the Court expressly invoked *Dixon* in approximately 12% of a large and relevant sample of cases. When, instead, the court acts completely without comment, its silent denial may "indicate th[e] court has considered and rejected the merits of each claim raised." *In*

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[10] *See* Judicial Council of California, 2015 Court Statistics Report, at 10, available at http://www.courts.ca.gov/documents/2015-Court-Statistics-Report.pdf (noting annual California Supreme Court dispositions of original habeas petitions ranging from 2,285 to 3,759 in recent years). The California Supreme Court also disposes each year of several hundred additional petitions for review in which a prisoner seeks review of a lower court's denial of habeas relief. *Id.* at 7.

re Reno, 55 Cal. 4th 428, 447 (2012). That is exactly what this Court presumes. *Richter*, 562 U.S. at 99-100. The entire system is rational, clear, and fair. There is no basis for the court below to require state lawyers, in order to justify respect for the *Dixon* procedural bar in later federal proceedings, to examine the underlying files in thousands of silent-denial cases to determine whether the state court could have invoked a *Dixon* bar—and then to hold *against* the State, on a theory of "inconsistency," any case in which the court instead gave a habeas petitioner the benefit of review on the merits. *See Martin*, 562 U.S. at 319.

The habeas "adequacy" doctrine is designed to prevent a state court's reliance on a procedural bar from blocking later review of a federal claim on the merits in rare circumstances in which application of the state rule involved unfair surprise, arbitrariness or irrationality, or discrimination against federal rights or claims. *See, e.g.*, *Martin*, 562 U.S. at 311, 320 n.7, 321. Lee has never contended that application of the *Dixon* bar here involved any such thing. The court below thus erred in applying the doctrine in this case, and in particular in requiring the State to prove that a common and regularly invoked procedural bar rule was "adequate" for federal habeas purpose, rather than requiring Lee to prove that it was not. Procedural defaults affect the scope and outcome of a large proportion of federal habeas cases, and the conflict in the lower courts on the burden-of-proof question warrants resolution by this Court.[11]

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[11] *See* King & Hoffman, *Envisioning Post-Conviction Review for the Twenty-First Century*, 78 Miss. L.J. 433, 440 (2008) (almost 20% of non-capital federal habeas cases involve a procedurally defaulted claim).

3. The questions in this case implicate fundamental principles and interests at the heart of this Court's habeas jurisprudence. As this Court has observed, in the structure of federal habeas law the exhaustion requirement, respect for state procedural bars, and the statutory deference to merits decisions required under 28 U.S.C. § 2254(d) are all closely related and complementary. *Martin*, 562 U.S. at 315-316; *Richter*, 562 U.S. at 103. All three work to help "ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding." *Richter*, 562 U.S. at 103.

Here, for example, if a defendant fails to raise a claim on direct appeal, and the claim is later raised but deemed *Dixon*-barred (that is, not within any recognized exception) on state collateral review, the proper outcome is that the claim has been forfeited by failure to raise it at the appropriate time to permit efficient and orderly review. Under the decision below, however, such a claim could instead be properly presented in federal habeas proceedings—in the first instance, and for review *de novo* rather than under the deferential standard that § 2254(d) would impose if the claim had been properly presented to the state courts and resolved on the merits on direct appeal. A ruling that permits (or even encourages) litigants to withhold claims from the state courts in their primary appeal is inconsistent with ensuring that "state courts are the principal forum for asserting constitutional challenges to state convictions." *Richter*, 562 U.S. at 103.

The court of appeals' opinion also implicates the fundamental principle that federal courts should not seek to dictate how state courts manage their operations. The court of appeals faulted California's *Dixon* rule because the State did not prove that it was applied with "mechanical[]" consistency. App. 11a. But

this Court has expressed concern that "if forced to choose, many States would opt for mandatory rules to avoid the high costs that come with plenary federal review." *Kindler*, 558 U.S. at 61. That "would be particularly unfortunate for criminal defendants, who would lose the opportunity to argue that a procedural default should be excused through the exercise of judicial discretion." *Id.* It is not a choice that federal habeas courts should seek to foist on their state counterparts. *See also Martin*, 562 U.S. at 311 (California should not be forced to choose between implementing an inflexible deadline "or preserving the flexibility of current practice, 'but only at the cost of undermining the finality of state court judgments'"). Similarly, the decision below interferes with state court processes by effectively directing that state courts forgo unexplained denials in state habeas cases and, as a substantive matter, always apply an available procedural bar even if it would be more efficient in a particular case to proceed directly to the merits. That conflicts not only with *Martin*'s express approval of taking "the easier path" to resolve any given case, 562 U.S. at 319, but also with this Court's recognition of the important role summary dispositions can play in busy state systems, *see Richter*, 562 U.S. at 99; *see also Johnson v. Williams*, 133 S. Ct. 1088, 1095 (2013) ("federal courts have no authority to impose mandatory opinion-writing standards on state courts").[12]

The questions presented in this case implicate the States' critical interest in enforcing reasonable procedural rules in the state courts. "A State's procedural rules are of vital importance to the orderly

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[12] *Cf. Carey v. Saffold*, 536 U.S. 214, 225-226 (2002) (exploring reasons why a court may sometimes "address the merits of a claim that it believes was presented in an untimely way").

administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997). Of particular relevance here, the Court has clearly recognized the important purposes served by rules "requir[ing] the defendant initially to raise his legal claims on appeal rather than on post-conviction review." *Murray v. Carrier*, 477 U.S. 478, 490 (1986). Such rules

> afford[] the state courts the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal.... This type of rule promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case.

Id. at 490-491 (quoting *Reed v. Ross*, 468 U.S. 1, 10-11 (1984)).[13]

The importance of these purposes is presumably why many other States also have rules that, like *Dixon*, require claims to be brought on direct appeal, while excusing noncompliance in appropriate circum-

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[13] The California Supreme Court has described *Dixon* as "speed[ing] resolution of claims, avoid[ing] delay, ... encourage[ing] the finality of judgments," and allowing resolution of claims while "the evidence is relatively fresh," before "'evidence may have disappeared and witnesses may have become unavailable.'" *In re Reno*, 55 Cal. 4th at 490.

stances.[14] "Normally, in [this Court's] review of state-court judgments, such rules constitute an adequate and independent state-law ground preventing us from reviewing the federal claim." *Sanchez-Llamas*, 548 U.S. at 351; *see, e.g.*, *Bradshaw v. Richey*, 546 U.S. 74, 79 (2005) (enforcing Ohio rule); *Dug-*

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[14] *See, e.g.*, Mich. Ct. R. 6.508(D) (barring postconviction relief for claims which "could have been raised on appeal," but noting exceptions for "jurisdictional defects," cases where there is a "significant possibility that the defendant is innocent," and cases where the defendant demonstrates "good cause" and "actual prejudice"); N.J. R. Ct. 3:22-4(a) (barring postconviction claims that were not raised on direct appeal, but with exceptions for, *inter alia*, claims based on a "new rule of [state or federal] constitutional law" or cases where enforcement of the bar "would result in fundamental injustice"); N.C. Gen. Stat. § 15A-1419(a)(3) & (b)(2) (barring postconviction relief for claim that could have been raised on direct appeal, but stating exception where "failure to consider the defendant's claim will result in a fundamental miscarriage of justice"); Idaho Code § 19-4901(b) (postconviction review not available for "[a]ny issue which could have been raised on direct appeal," unless, *inter alia*, "the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt"); Me. Stat. tit. 15, §§ 2128(1), 2128-A (Maine rule barring postconviction review of errors that "could have been raised on a direct appeal," but incorporating any exceptions that would apply "in a federal habeas corpus proceeding"); *Townsend v. State*, 723 N.W.2d 14, 18 (Minn. 2006) (recounting Minnesota rule, which bars postconviction review of claims that were not raised on direct appeal but which does not apply to cases where the claim would have been novel at the time of direct appeal, or where "'fairness'" requires review and the petitioner's default was not "'deliberate[] and inexcusabl[e]'"). *See also, e.g.*, Fla. R. Crim. Proc. 3.850(c); Haw. R. Penal P 40(a)(3); La. Code Crim. Proc. art. 930.4(C); Nev. Rev. Stat. § 34.810(1)(b)(2); N.Y. Crim. Proc. Law § 440.10(2)(c); *State v. Perry*, 10 Ohio St. 2d 175, 182 (1967); Okla. Stat. tit. 22, § 1089(C)(1); Tenn. Code Ann. § 40-30-106(g); Utah Code Ann. § 78B-9-106(1)(c); *Slayton v. Parrigan*, 215 Va. 27, 30 (1974). *See also* p. 15-16, *supra* (noting similar federal rule).

ger v. Adams, 489 U.S. 401, 408-409 (1989) (enforcing Florida rule); *Teague v. Lane*, 489 U.S. 288, 297-298 (1989) (enforcing Ohio rule); *Murray*, 477 U.S. at 489-490 (enforcing Virginia rule). The court of appeals' conclusion that such restrictions did not apply to its review of Lee's claims cannot be reconciled either with this Court's precedents or with basic principles of federal habeas jurisprudence. Its decision warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 15, 2015

Appendix

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONNA KAY LEE *Petitioner-Appellant,*	)	No. 12-56258
	)	D.C. No.
v.	)	2:01-cv-10751-PA-PLA
DEBRA JACQUEZ, *Respondent-Appellee.*	)	OPINION

Appeal from the United District Court
For the Central District of California
Percy Anderson, District Judge, Presiding

Argued and Submitted
November 17, 2014—Pasadena, California

Filed June 9, 2015

Before: Mary M. Schroeder, Harry Pregerson, and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Nguyen

SUMMARY*

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Habeas Corpus

The panel reversed the district court's denial of California state prisoner Donna Kay Lee's habeas corpus petition challenging her first-degree murder convictions and remanding for the district court to consider Lee's claims on the merits.

The district court found that *Ex parte Dixon*, 264 P.2d 513 (Cal. 1953), which prohibits California state courts from considering habeas claims that should have been raised on direct appeal but were omitted, is an adequate and independent state law procedural rule that bars federal review of Lee's claims.

Assuming without deciding that *Dixon* is an independent state law rule, the panel held that the state has failed to meet its burden of demonstrating the *Dixon* bar's adequacy at the time of Lee's procedural default. The panel wrote that where the state endorsed a statistical analysis to demonstrate a rule's adequacy, and the panel is left only with evidence that the *Dixon* bar was applied to between seven and twenty-one percent of all habeas cases filed in the months surrounding Lee's default, the state failed to meet its burden of proving that the *Dixon* bar was adequate.

COUNSEL

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Robert M. Snider (argued), Deputy Attorney General; Dane R. Gillette, Chief Assistant Attorney General; Lance E. Winters, Senior Assistant Attorney General; Kenneth C. Byrne, Supervising Deputy Attorney General; and Kamala D. Harris, Attorney General of California, Los Angeles, California, for Respondent-Appellee.

OPINION

NGUYEN, Circuit Judge:

Donna Kay Lee is serving two life sentences without the possibility of parole in a California state prison for first degree murder. After the California Court of Appeal affirmed her conviction on direct appeal, Lee filed various habeas petitions in state courts. All of her claims were denied, some on the merits and others as procedurally barred. This appeal concerns eleven claims that the California Supreme Court found to be procedurally barred under the *Dixon* rule, which prohibits California state courts from considering habeas claims that should have been raised on direct appeal but were omitted. *Ex parte Dixon*, 264 P.2d 513 (Cal. 1953). On federal habeas review, the district court found that *Dixon* is an adequate and independent state law procedural rule that bars federal review of Lee's claims. However, even assuming, without deciding, that *Dixon* is an independent state law rule, the state has failed to meet its burden of demonstrating the *Dixon* bar's adequacy at the time of

Lee's procedural default. Thus, we reverse and remand for the district court to consider her claims on the merits.

BACKGROUND

On March 23, 1998, Lee was convicted of two counts of first degree murder in Los Angeles County Superior Court. She was sentenced to two life sentences without the possibility of parole, plus an additional two years for the use of a knife. Lee appealed her conviction on June 10, 1999, raising four claims.[1] Her appeal was denied on the merits on August 28, 2000. The California Supreme Court affirmed on December 13, 2000.

Proceeding *pro se,* Lee filed a habeas petition in federal court, raising fourteen claims. After the government moved to dismiss the petition as largely unexhausted, Lee moved to withdraw her petition without prejudice to allow her to exhaust her claims in state court. The district court held her motion in abeyance, and ordered Lee to either submit a First Amended Petition, limited to her exhausted claims, or move for voluntary dismissal to pursue her claims in state court. In response, Lee submitted a First Amended Petition, and also moved to stay the proceedings while she exhausted her other claims in state court. The district court granted a stay, and Lee returned to state court to seek habeas relief, raising eleven claims.

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[1] Though her original appeal lists five claims, *see People v. Lee*, No. B126544, slip op. at 14 (Cal. Ct. App. Aug. 28, 2000), her first and second claims were later consolidated on habeas review.

After Lee's habeas petitions in both the California Superior Court and the Court of Appeal were denied,[2] she filed a habeas petition with the California Supreme Court, raising eleven claims from her original federal petition and a new claim regarding an alleged improper exclusion of female jurors. The Court denied her petition with citations to *In re Waltreus*, 397 P.2d 1001 (Cal. 1965), *In re Seaton*, 95 P.3d 896 (Cal. 2004), and *Dixon*.

Lee then returned to federal court to proceed with her federal habeas petition. In a Second Amended Petition, she included the four claims she had initially raised on direct appeal to the California courts, seven newly-exhausted claims, and four supplemental claims (which corresponded to the first four claims raised in her state habeas petition). The district court dismissed her petition, rejecting four claims on the merits and finding the rest to be procedurally defaulted under *Dixon*. On appeal, we affirmed the dismissal of two of Lee's claims on the merits[3] and reversed as to the procedural default issue, finding that the district court had "erroneously concluded that the Ninth Cirucit had found the *Dixon* rule to be an independent and adequate state law ground." *Lee v. Jacquez*, 406 F App'x 148, 150 (9th Cir. 2010). We

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[2] Because all California courts have original jurisdiction in habeas corpus proceedings, Cal. Const. Art. VI, § 10, "no appeal lies from the denial of a petition for writ of habeas corpus." *In re Clark*, 855 P.2d 729, 767 n.7 (Cal. 1993). Thus, a petitioner may seek relief by filing new petitions in each court, though subsequent claims are limited to those raised in the first petition. *See In re Martinez*, 209 P.3d 908, 915 (Cal. 2009).

[3] We affirmed the denial of Lee's claims regarding severance and battered women's syndrome, both of which were raised on direct appeal. *Lee v. Jacquez*, 406 F. App'x 148, 149 (9th Cir. 2010). Lee did not appeal the district court's denial on the merits of her two remaining claims, and thus we did not consider them. *See id.*

remanded to give the state an opportunity to present evidence of the *Dixon* rule's independence and adequacy. *Id.* On remand, the district court again concluded that the *Dixon* bar was an independent and adequate state law rule at the time of Lee's procedural default. This timely appeal followed.

DISCUSSION

Lee argues that the state failed to meet its burden of proving that *Dixon* is an independent and adequate state law ground barring federal review of her habeas claims. We have jurisdiction to review her claim under 28 U.S.C. §§ 1291 and 2253, and we review the district court's denial of her habeas petition *de novo*. *Ybarra v. McDaniel*, 656 F.3d 984, 989 (9th Cir. 2011.)

We now hold that the state failed to meet its burden of proving the *Dixon* bar's adequacy at the time of Lee's procedural default. Because a state procedural rule must be both independent *and* adequate to prevent federal habeas review, we need not decide whether *Dixon* is an independent state law ground.

The Adequacy Requirement

"A federal habeas court will not review a claim rejected by a state court 'if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Beard v. Kindler*, 558 U.S. 53, 55 (2009) (alteration in original) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). This rule arises from the need to "show proper respect for state courts and avoid rendering advisory opinions." *Id.* at 63 (Kennedy, J., concurring).

Conversely, an inadequate state law ground will not bar federal review of a claim's merits. "We have not allowed state courts to bar review of federal claims by invoking new procedural rules without adequate notice to litigants who . have in good faith complied with existing state procedural law." *Id.* at 63-64.

Here, the California Supreme Court declined to review the merits of Lee's claims by invoking *Dixon*'s procedural bar, which prevents state courts from considering habeas claims that should have been raised on direct appeal but were not. *Dixon* 264 P.2d at 514. The parties do not contest that the *Dixon* rule, if independent and adequate, would bar all of Lee's remaining habeas claims except two (Ground 6 and Supplemental Ground 4), because Lee failed to first raise these claims on direct appeal of her conviction.[4]

Adequacy is evaluated at the time of the petitioner's purported default, which for *Dixon* is the date when the petitioner could have raised the claims on direct appeal. *Fields v. Calderon*, 125 F.3d 757, 760-61 (9th Cir. 1997). In order to be adequate, a procedural bar must be "clear, consistently applied, and well-established at the time of the petitioner's purported default." *Collier v.*

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[4] A federal court may review the merits of a claim that was procedurally defaulted on an independent and adequate state procedural ground if the petitioner "can demonstrate cause for the procedural default and actual prejudice, or demonstrate that the failure to consider the claims will result in a fundamental miscarriage of justice." *Noltie v. Peterson*, 9 F.3d 802, 804-05 (9th Cir. 1993). Here, Lee has not asserted good cause for her default, nor has she claimed that a fundamental miscarriage of justice would occur absent consideration of her claim. *See Lee v. Mitchell*, No. 01-10751-PA, slip op. at 20 (C.D. Cal. June 19, 2007). Thus, we do not reach these issues.

Bayer, 408 F.3d 1279, 1284 (9th Cir. 2005) (quoting *Calderon v. United States District Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996)). The Supreme Court has described this requirement as asking whether a state procedural rule was "firmly established and regularly followed" at the time of the petitioner's default. *Walker v. Martin*, 131 S. Ct. 1120, 1127-28 (2011) (quoting *Kindler*, 558 U.S. at 60-61). The adequacy requirement exists to prevent state courts from discriminating against "disfavored claims," and to "ensure that habeas petitioners have fair notice of what they must do to avoid default." *Kindler v. Horn*, 642 F.3d 398, 401 (3d Cir. 2011).

We have established a burden-shifting regime to guide our evaluation of a state procedural bar's adequacy. *See Bennett v. Mueller*, 322 F.3d 573 (9th Cir. 2003). First, the state must plead the existence of an independent and adequate state procedural bar as an affirmative defense. *Id.* at 586. Next, the burden shifts to the petitioner, who must "assert[] specific factual allegations that demonstrate the inadequacy of the state procedure, incluing citation to authority demonstrating inconsistent application of the rule." *Id.* The petitioner's burden at this stage is "modest," *Dennis v. Brown*, 361 F Supp.2d 1124, 1130 (N.D. Cal. 2005), and the use of unpublished decisions to show the state's "actual practice" is encou-aged, *Powell v. Lambert*, 357 F.3d 871, 879 (9th Cir. 2004). If the petitioner successfully puts adequacy at issue, then the burden shifts back to the state, which must carry "the ultimate burden of proving the adequacy of [a] . state [procedural] bar" as an affirmative defense. *Bennett*, 322 F.3d at 585-86.

Applying *Bennett's* burden-shifting framework to this case, we conclude that the state has satisfied its initial burden by adequately pleading the independence and adequacy of *Dixon* as an affirmative defense. At the second step, our previous remand in this case suggests that Lee has met her burden of putting the adequacy of the *Dixon* rule at issue. *See Lee*, 406 F App'x at 150 (noting that Lee "presented evidence challenging the independence and adequacy of" the *Dixon* rule and remanding to the district court for an evaluation of the state's "evidence to the contrary"). Thus, we are left at the final stage of *Bennett's* framework, where the state must prove the *Dixon* bar's adequacy.

A. *Walker v. Martin* and Discretionary State Procedural Bars

The state argues that the Supreme Court's decision in *Walker v. Martin*, 131 S. Ct. 1120 (2011), means that the *Dixon* bar may be adequate even if the rule was applied inconsistently during the time period surrounding Lee's default. This argument misreads *Martin's* holding and scope.

In *Walker v. Martin*, the Supreme Court found California's timeliness procedural bar to be an independent and adequate state procedural ground that bars later federal habeas review of a claim on the merits. *Id.* at 1131. "California does not employ fixed statutory deadlines to determine the timeliness of a state prisoner's petition for habeas corpus. Instead, California directs petitioners to file known claims 'as promptly as the circumstances allow.'" *Id.* at 1124 (quoting *In re Clark*, 855 P.2d 729, 738 n. 5 (Cal. 1993)). This rule has also been described as setting a general "reasonableness"

standard, where a habeas petition is deemed timely if it was filed within a reasonable period of time. *See Carey v. Saffold*, 536 U.S. 214, 221 (2002). California courts will generally deny untimely petitions by citing to the California Supreme Court decisions of *In re Clark*, 855 P.2d 729 (Cal. 1993) and *In re Robbins*, 959 P.2d 311 (Cal. 1998). *Martin*, 131 S. Ct. at 1124.

"[O]utcomes under [this] rule vary from case to case," *id.* at 1129, as courts must must evaluate the reasonableness of a filing based on the particular circumstances of each petition. Nevertheless, relying on its previous opinion in *Beard v. Kindler*, which first held that "a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review," 558 U.S. at 60, the *Martin* Court found California's discretionary timeliness rule to be both firmly established and regularly followed. 131 S. Ct. at 1128-29. The rule had developed through case law, putting habeas petitioners on notice that they must "alleg[e] with specificity" why their petition was not substantially delayed or explain their eligibility for an exception to the time bar. *Id.* at 1128 (alteration in original) (quoting *In re Gallego*, 959 P.2d 290, 299 (Cal. 1998)). Thus, even though the rule's language is "indeterminate" and does not set strict filing deadlines, its "[a]pplication in particular circumstances supplie[s] the requisite clarity" for the purposes of establishing adequacy. *Id.* The *Martin* Court noted that the California courts "regularly follow[]" and "regularly invoke" the timeliness rule, and did so around the time the petitioner had filed for habeas relief. *Id.* at 1229.

Relying on *Martin*, the state argues that, like California's timeliness rule, *Dixon* is a discretionary

procedural bar, and any inconsistency in *Dixon's* application reflects only the state's exercise of discretion rather than the rule's inadequacy. We find this argument unpersuasive. California's timeliness rule is inherently discretionary in its initial application, while the *Dixon* rule is mandatory in the first instance. Evaluating whether a habeas petition has been "filed as promptly as the circumstances allow" requires a case-specific evaluation in every instance, leading inevitably to varied outcomes. *Id.* at 1125 (quoting *Clark*, 855 P.2d at 738 n.5). The *Dixon* bar, in contrast, is meant to apply to all habeas claims that could have been raised on direct appeal but were not. *Robbins*, 959 P.3d at 340 n.34 (noting that California courts apply the *Dixon* bar "whenever applicable"). Deciding whether a claim is barred by *Dixon* involves not a malleable, circumstance-specific question of "reasonableness," but a straightforward review of the record: A claim is either record-based, or it is not, and the petitioner either raised or omitted a claim on direct appeal. Thus, California state courts should be able to apply the *Dixon* bar mechanically and consistently, and a failure to cite *Dixon* where *Dixon* applies does not reflect the exercise of discretion so much as it reflects the irregular application of the rule.

The state attempts to get around *Dixon*'s mandatory applicability by focusing on the rule's four *Harris* exceptions. *See In re Harris*, 855 p.2d 391, 395 n.3, 398-407 (Cal. 1993) (detailing the four exceptions to the *Dixon* rule); *see also Robbins*, 959 P.2d at 340 n. 34 (clarifying that the court considers the *Harris* exceptions when imposing the *Dixon* bar). These exceptions allow courts to excuse a *Dixon* procedural default if a "fundamental constitutional error" occurred, if the

original court lacked or acted in excess of its jurisdiction, or if there has been "a change in the law affecting the petitioner." *Harris*, 855 P.2d at 398-407. Since courts may decline to apply the *Dixon* bar when an exception excuses a petitioner's failure to raise a claim on appeal, the state argues that *Dixon* and the timeliness rule are similarly discretionary.

While the state's argument has some superficial appeal, we do not believe that *Dixon's* exceptions transform a mandatory rule into a discretionary one. First, like the *Dixon* rule, the timeliness bar also has four exceptions. *Clark*, 855 P.2d a 797-98. Yet *Martin* mentioned these exceptions only in passing. *See* 131 S. Ct. at 1128. Instead, the Court focused its analysis on the discretion inherent in the timeliness bar's initial application, rather than on the application of the bar's exceptions. *See id.* at 1125 (noting that its holding means to ensure that California could maintain the "flexibility of current practice"), 1130 (noting that discretion allows courts to "avoid harsh results," and emphasizing the importance of encouraging states to choose more malleable rules).

Thus, even if courts must exercise discretion when applying *Dixon's* exceptions, this analysis occurs only after *Dixon* has first been applied. *See, e.g., In re Preston*, 98 Cal. Rptr. 3d 340, 344 (Cal. Ct. App. 2009) (noting the applicability of the *Dixon* bar, and then applying one of *Dixon's* four exceptions to consider the claim on the merits); *In re Crockett*, 71 Cal. Rptr. 3d 632, 637 (Cal. Ct. App. 2008) (same). And the state court will likely invoke an exception to the *Dixon* bar whenever it applies, instead of simply not applying *Dixon* without explanation. *Cf. Robbins*, 959 P.3d at 340 n.34 ("When, in our orders, we

impose the [*Dixon*] bar[] this signifies that we have concluded that none of the four [Harris] exceptions apply.").

Second, the *Martin* opinion carefully focused its holding on discretionary rules, expressly noting that it "leaves unaltered [the Supreme] Court's repeated recognition that federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights." 131 S. Ct. at 1130. In short, *Martin* does not support the state's argument that the inconsistent application of a state procedural rule merely reflects the state's exercise of discretion.[5] To the contrary, while *Martin* noted that "[a] discretionary rule ought not be disregarded automatically upon a showing of seeming inconsistencies," *id.* (emphasis added), the Court also stated that "a state [procedural] rule must be 'firmly established and regularly followed'" to be deemed adequate, *id.* at 1127-28 (quoting *Kindler*, 558 U.S. at 60).

We concluded that in order to bar federal review of Lee's habeas claims, the state must prove the *Dixon* rule's regular and consistent application around the time of Lee's default. We now turn to the state's attempt to do so.

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[5] Our conclusion is buttressed by the fact that other circuits have continued to ask whether state procedural rules are regularly followed and consistently applied after the *Martin* decision. *See, e.g.*, *Lee v. Corsini*, 777 F.3d 46, 54 (1st Cir. 2015) (citing the "regularly followed" standard for adequacy); *Lark v. Sec'y Pa. Dep't of Corr.*, 654 F.3d 596, 613 (3d Cir. 2011) (distinguishing a "facially mandatory state procedural rule which was not clearly followed" from the discretionary rules evaluated in *Walker* and *Kindler*).

B. The State's Burden

The parties dispute what precisely the state must show in order to meet its burden at the final state of *Bennett's* test. As noted, adequacy requires that a rule be "clear, consistently applied, and well-established," *Collier*, 408 F.3d at 1284 (quoting *Bean*, 96 F.3d at 1129), and "firmly established and regularly followed," *Martin*, 131 S. Ct. at 1127-28 (quoting *Kindler*, 558 U.S. at 60-61). Yet we lack "binding case law defining what is a statistically insignificant irregularity and inconsistency in the application of a state procedural bar." *Monarrez v. Alameda*, No. 03-00104, 2005 WL 2333462 (C.D. Cal. Sept. 22, 2005), at *6. Some cases have suggested that a rule must be applied in the "vast majority" of cases in order to be considered adequate. *Scott v. Schriro*, 567 F.3d 573, 580 (9th Cir. 2009) (quoting *Dugger v. Adams*, 489 U.S. 401, 411 n.6 (1989)); *see also Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th Cir. 1996). A closer look at these cases, however, suggests that the court was describing a sufficient but unnecessary condition—while a rule applied in the "vast majority" of cases is most likely adequate, such a showing is not required for a rule to be found adequate. *See Dugger*, 489 U.S. at 410 n. 6 (noting that "[i]n the vast majority of cases . the Florida Supreme Court has faithfully applied" the rule at issue, without seeming to set out an absolute standard); *Scott*, 567 F.3d at 580 (internal quotation marks and citation omitted) (stating that a procedural bar "is considered consistently applied and well-established if the state courts follow it in the vast majority of cases"). Thus, while a state's reliance on a procedural ground in the vast majority of cases would likely prove the rule's adequacy, the state need not necessarily reach such a high statistical bar in order to prove its affirmative defense.

Bennett does provide some specific guidance regarding the state's ultimate burden, noting that "[t]he scope of the state's burden of proof will be measured by the specific claims of inadequacy put forth by the petitioner.'" 322 F.3d at 584-85 (quoting *hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir. 1999)). *Bennett* also advises the state to provide "records and authorities [that] prove whether its courts have regularly and consistently applied the procedural bar," 322 F.3d at 585, which suggests that the state should do more than just discredit the petitioner's evidence from *Bennett's* second step. *See also Monarrez*, No. 03-00104, at *6 (finding that the state failed to meet its ultimate burden under *Bennett* when it merely contested petitioner's evidence of inadequacy without providing its own affirmative evidence).

Additionally, we know that the *Dixon* bar was applied inconsistently until at least September 30, 1993, when the California Supreme Court decided *Harris* to "provide needed guidance" for application of the rule going forward. 855 P.2d at 395 n.3, 398; *see also Fields*, 125 F.3d at 763 (noting that *Dixon* "had been obscured" by inconsistent application over the years); *La Crosse v. Kernan*, 244 F.3d 702, 705 (9th Cir. 2001) (reading *Fields* to hold *Dixon* as per se inadequate until at least 1993). Almost five years later, the California Supreme Court noted in *Robbins* that it needed to again "provide guidance" on the *Dixon* rule, suggesting that the rule's application did not become consistent in the time period immediately following *Harris*. 959 P.2d at 340 n.34; *see also Park v. California*, 202 F.3d 1146, 1152 n.4 (9th Cir. 2000) (reading *Robbins* as an attempt "to establish the adequacy of future *Dixon*" decisions).

After *Robbins* was decided, however, *Dixon's* adequacy remains unclear. Though *Harris* and *Robbins* meant to create consistent application of the rule going forward, "it does not follow that the rule in historical fact has been so applied." *Bennett*, 322 F.3d at 583. In fact, while no Ninth Circuit case has found *Dixon* to be inadequate in the post-*Harris* era, *Cree v. Sisto*, No. 2:08-CV-00487, 2011 WL 66253, (E.D. Cal. Jan. 7, 2011), at *2, in no case has the state met its burden of proving *Dixon's adequacy at Bennett's* third step. *See, e.g., Dennis v. Brown*, 361 F Supp. 2d 1124, 1133 (N.D. Cal. 2005) (concluding that the state failed to meet its burden because it cited no cases or opinions showing actual practice. *Ayala v. Ayers*, No. 01-CV-0742, 2008 WL 1787317 (S.D. Cal. Apr. 16, 2008) (same) *Vaughn v. Adams*, No. CVF-015241, 2006 WL 1439400 (E.D. Cal. May 22, 2006), *adopted in full by Vaughn v. Adams*, No. 1:01-CV-05241, 2006 WL 1774915 (E.D. Cal. June 24, 2006) (finding that the state failed to meet its burden because it did not overcome the specific evidence submitted by the petitioner showing *Dixon's* inadequacy). In every case where the state has been permitted to use the *Dixon* bar as an affirmative defense, the petitioner failed to place the adequacy of the bar at issue as required by *Bennett's* second step. *See, e.g., Cree v. Sisto*, No. 2:08-00487, 2011 WL 66253 (E.D. Cal. Jan. 7, 2011); *Johnson v. Giurbino*, No. 1:03-CV-06013, 2007 WL 2481789 (E.D. Cal. Aug. 29, 2007); *Sanchez v. Ryan*, 392 F.Supp.2d 1136, 1138-39 (C.D. Cal. 2005); *Flores v. Roe*, No. 05-5296, 2005 WL 1406086 (E.D. Cal. June 14, 2005), *aff'd by Flores v. Roe*, 228 F App'x 690 (9th Cir. 2007); *Protsman v. Pliler*, 318 F.Supp. 2d 1004, 1014 (S.D. Cal. 2004).

While these lower court evaluations of *Dixon's* adequacy are not binding, these decisions inform our

analysis because "[a] procedural rule is either adequate or inadequate during a given time period." *King v. LaMarque*, 464 F.3d 963, 968 (9th Cir. 2006). Thus, the fact that the state has never shown *Dixon's* adequate application at *Bennett's* third step is not insignificant as we evaluate its efforts to meet its burden in this case.

C. The State's Evidence

With this backdrop in mind, we turn to the state's evidence. The state analyzed 4,700 California Supreme Court habeas denials surrounding the time of Lee's June 10, 1999 default, finding that the *Dixon* procedural bar was invoked in approximately twelve percent of all habeas denials. Though the application rate varied between seven and twenty-one percent across the months surveyed (August 1998 to June 2000), the state argues that this shows a "predictable" application of *Dixon* such that the rule was an adequate state law ground at the time of Lee's default.

We find this evidence entirely insufficient to meet the state's burden of showing the *Dixon* rule's adequacy. The state's evidence merely shows *Dixon's* application as a percentage of *all* habeas denials filed during this time period, and does not purport to show to how many cases the *Dixon* bar *should* have been applied. Logic dictates that in order to know if invoking *Dixon* in twelve percent of all cases shows consistent application, we need to know "the number of times that claims to which the *Dixon* rule could apply were instead rejected on the merits." *Lee v. Mitchell*, No. CV-01-10751-PA, 2012 WL 2194471, at *18 (C.D. Cal. May 1, 2012). Thus, we are missing the denominator that would give any meaning to the state's number. Without a baseline number against which to

measure the twelve percent application rate, this percentage in no way indicates the consistency of the rule's application.

The state attempts to cover the gap in its evidence in two ways. First, the state argues that many of the habeas denials from the surveyed time period were actually silently applying procedural bars that were first invoked by a lower state court. This may be so. If the California Supreme Court denies a habeas petition without explanation, the federal courts will presume that a procedural default was imposed if "the last reasoned opinion on the claim explicitly impose[d] a procedural default." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). But this argument does not relieve the state of its burden of proving adequacy. and the state does not identify cases in which a silent denial relied on a prior invocation of *Dixon*. As the Supreme Court has noted, "[t]he essence of unexplained orders is that they say nothing." *Id.* at 804. Thus, unless the state points out an underlying *Dixon* default behind an ambiguous denial, we cannot assume that a silent adoption of *Dixon* occurred.

Second, the state challenges the evidence submitted by Lee at *Bennett's* second step, which shows that the California Supreme Court failed to invoke *Dixon* in at least nine cases to which it should have been applied among its December 21, 1999 habeas denials. Upon close review of these cases, and mindful of the fact that we previously found that Lee met her burden of putting the *Dixon* rule's adequacy in question, *see Lee,* 406 F App'x at 150, we reject the state's challenge. While five of the cited cases raised ineffective assistance of counsel claims, which often involve extra-record issues that would not be barred by *Dixon*, these cases also had other record-based

claims to which *Dixon* should have applied. Since California courts regularly employ multiple procedural bars to deny petitions with multiple claims (as Lee's own case reflects), these five cases provide some evidence of inconsistent application of *Dixon*. Further, the state argues that several cases are distinguishable because they involve petitioners who had pled guilty, which restricted their rights on direct appeal. *See* Cal. Penal Code § 1237.5. But the state fails to explain how these restricted rights affect habeas petitions and *Dixon's* applicability—and the state's claim is also belied by the existence of several habeas cases where *Dixon* barred the claims of petitioners who had pled guilty. *See, e.g., Reyes v. Cash*, No. CV-13-1248, 2014 WL 3734550, at *1 (C.D. Cal. July 28, 2014) (noting that a petitioner who had pled guilty had his state habeas petition denied on procedural grounds, including by *Dixon*); *Gustafson v. Long*, No. CV-13-1737, 2014 WL 4187828, at *12 (C.D. Cal. Apr. 16, 2014) (same).

In sum, we are left only with evidence that the *Dixon* bar was applied to between seven and twenty-one percent of all habeas cases filed in the months surrounding Lee's default. Because this statistic, without more, is incomplete, the state failed to meet its burden of proving that the *Dixon* bar was "clear, consistently applied, and well-established at the time of [Lee's] purported default." *Collier*, 408 F.3d at 1284.[6]

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[6] Lee also argues that two of her claims, Ground 6 and Supplemental Ground 4, were sufficiently raised in her direct appeal such that they are not barred by *Dixon*. We need not address this argument because we find the *Dixon* bar to be an inadequate state law ground. All of her remaining claims should be considered on the merits on remand.

CONCLUSION

We do not suggest that the state must always use a statistical analysis to prove a rule's adequacy, and nor do we set any precise statistical bar that must be reached if the state does use such an approach. Here, however, the state chose to use just such a statistical framework, and argues that, if the *Dixon* bar is mandatory, statistical analysis would be the best way to demonstrate the rule's regular and consistent application. Endorsing this method, and then providing only a partial statistical picture, the state must now live with the inevitable result: *Dixon*'s application to twelve percent of all habeas denials tells us almost nothing about the rule's consistent application and, therefore, its adequacy. While the state requested at oral argument that we remand to allow it to compile the missing records, which the state conceded were likely available, we see no reason to give the state yet another chance. The state had a full opportunity to prove *Dixon's* adequacy and failed to do so. Thus, we remand for the district court to consider Lee's claims on the merits.

REVERSED AND VACATED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

DONNA KAY LEE,	)	**ORDER ADOPTING**
	)	**FINDINGS,**
Petitioner,	)	**CONCLUSIONS**
	)	**AND RECOMMEND-**
	)	**ATION OF UNITED**
v.	)	**STATES MAGIS-**
	)	**TRATE JUDGE**
GWENDOLYN MITCHELL, Warden,	)	
Respondent.	)	

INTRODUCTION

On May 1, 2012, the United States Magistrate Judge issued a Post-Remand Report and Recommendation ("Post-Remand R&R"), recommending that petitioner's Petition for Writ of Habeas Corpus be denied and the action dismissed with prejudice. Thereafter, on May 23, 2012, petitioner, through counsel, filed her "Objections to Post-Remand Report and Recommendation of United States Magistrate Judge [and] Application for Certificate of Appealability" ("Objections").

DISCUSSION

To the extent that petitioner reiterates in the Post-Remand R&R the arguments that she previously raised concerning the adequacy and independence of the *Dixon* rule, those objections have been addressed in the Post-Remand R&R. To the extent that petitioner is purporting to contend in her objections that the Post-Remand R&R is "internally inconsistent," "contradicts[s] the various relevant dockets [sic] and docket entries," and provides an "incomplete or misleading picture of the record" (Objections at 2), the Court notes that petitioner points to no specific inconsistent, contradictory, incomplete or misleading statement in the Post-Remand R&R.

Petitioner objects that the Magistrate Judge "accepts respondent's incorrect interpretation of *Martin* and appears to place the ultimate burden of proof of petitioner (Objections at 1, 5), but the Post-Remand R&R explicitly rejects respondent's interpretation of *Martin* (Post-Remand R&R at 19 n.6) and applies the burden-shifting scheme set forth in *Bennett* to the evidence adduced by the parties.

The Court further notes that petitioner misrepresents the applicability herein of *Monarrez v. Alameda*, 2005 WL 2333462, at *5-6 (C.D. Cal. Sept. 22, 2005), by asserting that the court therein found that the "same evidence provided here by petitioner" was found sufficient to meet petitioner's burden under *Bennett*. (Objections at 9). In petitioner's case, the Magistrate Judge assumed that the Ninth Circuit found that petitioner's evidence pertaining to the adequacy of the *Dixon* bar was sufficient to meet petitioner's burden under *Bennett* of placing the defense at issue. As noted in

the Post-Remand R&R, after the petitioner in *Monarrez* adduced evidence at the first step of the *Bennett* analysis, the respondent "did nothing to affirmatively demonstrate the adequacy of the *Dixon* rule." (Post-Remand R&R at 22). Accordingly, the only issue addressed in *Monarrez*, the sufficiency of petitioner's evidence at the first step of the *Bennett* analysis, is not before this Court.

The Court notes as well that petitioner inconsistently: (1) argues that the Magistrate Judge "exceeded the scope of the Ninth Circuit's mandate on remand" and "requests that the Court solely analyze respondent's evidence under Bennett for adequacy and independence at the time of default, as mandated by the Ninth Circuit" (Objections at 2-3); and also (2) objects to the Magistrate Judge's finding that all of her claims fall under the Dixon rule (Objections at 4-5). The Ninth Circuit in its Memorandum, however, did not hold or even imply that the Dixon bar was **not** applicable to all of petitioner's claims (Grounds 5-11 of the SAP and Supplemental Grounds 1-4). To the contrary, as set forth in the Post-Remand R&R, the Ninth Circuit referenced all of the relevant claims in directing this Court to "permit [respondent] to submit evidence" demonstrating the "independence and adequacy of *In re Dixon* at the time of [petitioner's] procedural default." (Post-Remand R&R (quoting Memorandum at 3-4)). A finding by this Court that the *Dixon* bar does not apply to some of the relevant claims undeniably would exceed petitioner's contention that the Ninth Circuit's mandate "unambiguously" is limited to an analysis of "respondent's evidence under *Bennett* for adequacy and independence at the time of default." (Objections at 3).

The Magistrate Judge has already addressed the flaws in petitioner's interpretation of the evidence of the adequacy of the *Dixon* bar at the time of petitioner's default in the Post-Remand R&R. In her Objections, petitioner now asserts, again without citation to any authority, that "[t]o be adequate to bar federal review, the state court must apply a state rule **where it is warranted**, not in a 'consistent percentage' of cases." (Objections at 11 (emphasis added)). The Supreme Court, however, has held that: "In order for a procedural bar to be adequate, state courts must employ a "firmly established and regularly followed state practice." *Ford*, 498 U.S. at 423-24. To the extent that petitioner is purporting to contend that the *Dixon* rule can only be held to be adequate upon a showing by respondent that the state court employs the rule "regularly" where it is warranted," as set forth in the Post-Remand R&R, respondent has adduced evidence that the rule was regularly applied in approximately twelve percent of habeas petitions denied in the six months prior to the time that petitioner filed her brief on direct appeal. The Court simply has no basis for finding that the application of the *Dixon* rule was "warranted" in more than twelve percent of the habeas petitions denied by the California Supreme Court during this, or any other, relevant time period. Similarly, the Court rejects petitioner's contention that the Magistrate Judge is "in error in concluding that this paltry rate of application of the bar establishes the rule's adequacy." (Objections at 9). According to petitioner's Reply and her Objections, the bases of her claim of error include merely her own speculation that "a much, much larger percentage of primarily non-capital habeas petitions would likely have included record-based claims" (Post-Remand R&R at 20 (citing Reply at 9)) and

the holding in *Monarrez* that the same evidence adduced herein by petitioner was sufficient to get past the first step in the *Bennett* analysis. (Objections at 9). Neither basis is sufficient to cast any doubt on respondent's evidence showing the adequacy of the *Dixon* rule.

CONCLUSION

Pursuant to 28 U.S.C. § 636, the Court has reviewed the entire file de novo, including the Magistrate Judge's Post-Remand Report and Recommendation, and petitioner's Objections thereto. The court agrees with the recommendations of the Magistrate Judge.

ACCORDINGLY, IT IS ORDERED:

1. The Post-Remand Report and Recommendation is adopted.

2. Judgment shall be entered consistent with this order.

3. The clerk shall serve this order and the judgment on all counsel or parties or record.

DATED: June 11, 2012

s/ Percy Anderson
HONORABLE PERCY ANDERSON
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

DONNA KAY LEE,	)	POST-REMAND
	)	REPORT AND
Petitioner,	)	RECOMMENDATION
	)	OF UNITED STATES
v.	)	MAGISTRATE
	)	JUDGE
GWENDOLYN MITCHELL, Warden,	)	
	)	
Respondent.	)	
	)	

This Post-Remand Report and Recommendation is submitted to the Honorable Percy Anderson, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, the Magistrate Judge recommends that petitioner's Grounds 5-11 of the Second Amended Petition and her Supplemental Grounds 1-4 once again be dismissed as procedurally barred.

I.

SUMMARY OF PROCEEDINGS

A. PROCEEDINGS PRIOR TO PETITIONER'S APPEAL TO NINTH CIRCUIT

On March 23, 1998, a Los Angeles County Superior Court jury convicted petitioner of two counts of first degree murder. The jury also found true the allegations that petitioner personally used a knife in committing both murders, and found true the special circumstances of multiple murders, lying in wait, and murder for financial gain. Cal. Penal Code §§ 12022(b), 190.2(a)(3), 190.2(a)(15), 190.2(a)(1). (*See* respondent's Motion to Dismiss ("Motion"), Ex. A). Petitioner was sentenced to life in state prison without the possibility of parole, plus an additional two years for her use of a knife. (See Motion, Ex. B).

In her Opening Brief on direct appeal to the California Court of Appeal, filed on June 10, 1999 (see Appellant's Ninth Circuit Opening Brief ("Opening Brief"), at 33), petitioner raised four claims: (1) her right to present a defense was violated when the trial court excluded evidence of her sexual relationship with her co-defendant, along with expert testimony that she suffered from battered women's syndrome ("BWS"); (2) the trial court's refusal to sever petitioner's trial from that of her co-defendant resulted in a joint trial with mutually antagonistic defenses and the exclusion of evidence critical to petitioner's defense; (3) the trial court erred in refusing to instruct the jury that provocation could reduce the degree of the murders; and (4) the lying-in-wait

special circumstance allegation was unconstitutionally vague and overbroad. On August 28, 2000, in an unpublished decision, the California Court of Appeal affirmed the conviction. (*See* Motion, Ex. C).

Petitioner filed a petition for review in the California Supreme Court, raising the same grounds she had raised in the Court of Appeal. (*See* Motion, Ex. D). On December 13, 2000, the California Supreme Court denied review. (*See* Motion, Ex. E).

Petitioner filed her original federal habeas petition ("Petition") herein on December 13, 2001, raising fourteen claims. On February 15, 2002, respondent filed a Motion to Dismiss contending that the Petition must be dismissed as unexhausted. In response, on March 20, 2002, petitioner filed a First Amended Petition ("FAP"), raising only the four claims she had raised in the California Supreme Court on direct review. Respondent filed an Answer and Return to the FAP on July 5, 2002. Petitioner filed a Traverse thereto on September 3, 2002.

On January 13, 2003, petitioner filed a "Motion to Stay the Procedures with Leave of the Court to Exhaust State Remedies." The Court initially denied petitioner's Motion to Stay, but after consideration of subsequent case law, the Court granted petitioner's renewed request on December 8, 2003.

Meanwhile, petitioner filed a petition for writ of habeas corpus in the Los Angeles County Superior Court on November 3, 2003. That petition was denied on December 2, 2003, in an opinion finding that petitioner had failed to explain or justify her delay in seeking habeas relief and

citing the following cases: *In re Harris*, 5 Cal. 4th 813, 829 (1993); *In re Dixon*, 41 Cal. 2d 756 (1953); *In re Clark*, 5 Cal. 4th 750, 779 (1993); *People v. Karis*, 46 Cal. 3d 612, 656 (1988); and *In re Terry*, 4 Cal. 3d 911, 926 (1971). (See Return to Second Amended Petition ("Return to SAP"), Ex. A). Petitioner then filed a habeas petition in the California Court of Appeal on December 15, 2003, raising the same grounds. That petition was denied on January 8, 2004, as follows:

> Contentions raised and rejected on appeal may not be renewed in petitions for writ relief. (*See In re Terry* (1971) 4 Cal. 3d 911, 927; In re *Waltreus* (1965) 62 Cal. 2d 218, 225). Further, with regard to any issues not raised on appeal, petitioner has not stated facts sufficient to support relief (*In re Clark* (1993) 5 Cal. 4th 750, 763-787; *In re Swain* (1949) 34 Cal. 2d 300, 303-304) and has not submitted a record adequate for review (*Sherwood v. Superior Court* (1979) 24 Cal. 3d 183, 186-187).

(*See* Return to SAP, Ex. B).

On January 26, 2004, petitioner filed a petition for writ of habeas corpus in the California Supreme Court raising the following eleven claims: (1) petitioner's due process rights were violated because she was "never properly placed under arrest nor mirandized [sic]"; (2) petitioner's due process rights were violated by the systematic exclusion of "all female jurors"; (3) petitioner's due process rights and right to an impartial jury were violated when a juror committed misconduct by exclaiming, "What he killed his mother?"; (4) petitioner's due process rights

were violated when the trial court excluded evidence relevant to petitioner's defense as too prejudicial to her co-defendant and because the admission of her co-defendant's "almost confession spilled over onto petitioner and denied petitioner a defense", (5) petitioner's due process rights were violated because her initial trial counsel worked from the same office as that of her co-defendant; (6) petitioner's due process rights were violated when she was forced to testify in order to allow petitioner to present expert testimony on BWS; (7) petitioner's due process rights were violated when she was punished more harshly after she rejected various plea offers and chose to proceed to trial; (8) the prosecutor committed misconduct by introducing evidence of aiding and abetting when petitioner was not charged as an aider and abettor; (9) petitioner was sexually assaulted by a sheriff's deputy in a holding cell; (10) petitioner's rights to a fair trial and an impartial jury were violated when a juror "nodded off, several times during trial"; and (11) petitioner's right to an impartial jury was violated when two jurors, on separate occasions, were questioned in a public restroom about which case they were sitting on. (See Return to SAP, Ex. C). The petition was denied on December 1, 2004, with the following statement: "Petition for writ of habeas corpus is DENIED. (*See In re Waltreus* (1965) 62 Cal. 2d 218; *In re Dixon* (1953) 41 Cal. 2d 756; *In re Seaton* (2004) 34 Cal. 4th 193)." (See Return to SAP, Ex. D).

On January 3, 2005, petitioner filed a Motion to Amend herein along with a proposed Second Amended Petition ("SAP"). In the SAP, petitioner raised the same four grounds she had raised in her FAP herein as her Grounds 1 to 4 and, as her Grounds 5 to 11, the correspondingly-

numbered claims she had raised in her habeas petition to the California Supreme Court. The Court granted petitioner's Motion to Amend. On June 6, 2005, respondent filed a Return to Second Amended Petition ("Return to SAP") accompanied by a supporting Memorandum of Points and Authorities ("Return to SAP, Mem."), contending, *inter alia*, that petitioner's formerly unexhausted claims are procedurally barred. Respondent also addressed petitioner's claims on the merits. (Return to SAP, Mem. at 3-6).

On September 8, 2005, petitioner filed a Traverse to Return to Second Amended Petition ("Trav. to SAP"). At the same time, petitioner filed a Motion to Stay Traverse to Return to Second Amended Petition in which she sought leave to supplement the SAP with four additional grounds ("Supplemental" or "Sup. Grounds"). The four Supplemental Grounds correspond to the first four claims that petitioner had raised in her habeas petition to the California Supreme Court. (*See* "Petitioner Makes this Request to Add Four Exhausted Grounds to her Second Amended Petition"). Respondent filed an opposition thereto on October 12, 2005, contending that, while three of the proposed supplemental grounds are substantially similar to grounds raised in the Petition, petitioner's Supplemental Ground 2 had never been brought in a federal habeas petition and, consequently, was time-barred. (*See* Opp. to Motion to Stay at 3-4). Petitioner filed a response to respondent's opposition on November 2, 2005. On November 3, 2005, the Court granted petitioner's request to amend her SAP to add the four Supplemental Grounds.

On April 4, 2006, respondent filed a Supplemental Return to Second Amended Petition ("Sup. Return to SAP") accompanied by a supporting Memorandum of Points and Authorities, contending, *inter alia*, that petitioner's supplemental claims are procedurally defaulted and, that her Supplemental Ground 2 is time-barred. Respondent also addressed the supplemental claims on the merits. Petitioner filed a Traverse thereto ("Trav. to Sup. Return") on June 16, 2006.

On June 19, 2007, the Court issued a Report and Recommendation recommending that petitioner's Grounds 1 through 4 of the SAP be denied on the merits and that petitioner's Grounds 5-11 of the SAP and her Supplemental Grounds 1-4 be dismissed as procedurally barred. After the Court responded to petitioner's Objections to Report and Recommendation, in an Order issued on July 26, 2007, the District Judge adopted this Court's recommendation in its Final Report and Recommendation ("R&R") that judgment be entered denying the Petition and dismissing the action with prejudice.

B. PROCEEDINGS IN CONNECTION WITH PETITIONER'S APPEAL TO THE NINTH CIRCUIT

Petitioner's Request for a Certificate of Appealability was granted by the District Court only with respect to the finding that Grounds 5-11 of the SAP and Supplemental Grounds 1-4 are procedurally defaulted. Petitioner appealed the judgment to the Ninth Circuit. The Ninth Circuit ordered that counsel be appointed and requested that, "if new counsel identifies uncertified issues that

should be raised on appeal, counsel shall include them in the opening brief." (Ninth Cir. Order of October 17, 2008). Petitioner's counsel submitted an opening brief ("Opening Brief) on June 22, 2009, which raised the following issues[1]:

> (1) whether Grounds 5-11 of the SAP and Supplemental Grounds 1-4 are procedural defaulted when the default rests on "state court rules that have not been consistently applied and are not independent of federal law" (Opening Brief at 1);
>
> (2) whether petitioner was denied her right to a fair trial when the trial court refused to sever her case from that of her co-defendant (id. at 2);
>
> (3) whether petitioner's right "to put on an adequate defense and her right to a fair trial" were violated when she was prevented from presenting evidence on BWS during the guilt phase of the trial (*id.*); and
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> (4) whether petitioner was denied her right to a fair trial when one of the jurors repeatedly fell asleep during the trial (*id.*).

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[1] The Court notes that, in her Opening Brief, after arguing that the relevant claims are not procedurally barred, petitioner then incorrectly asserted that: "Given that the District Court also denied [petitioner's] claims on the merits after finding them procedurally barred, this court should review the following uncertified claims on the merits as well." (Opening Brief at 39). In its R&R, the Court found that Grounds 5-11 of the SAP and Supplemental Grounds 1-4 were procedurally defaulted (R&R at 16-21), did not address any of those claims on the merits, and recommended that only petitioner's Grounds 1-4 of the SAP be denied on the merits (R&R at 16-38).

Respondent submitted an answering brief on December 21, 2009, addressing only the procedural default issue that had been certified by the District Court ("Respondent's Brief on Appeal"). Petitioner submitted a reply thereto on February 5, 2010. The Ninth Circuit then ordered respondent to file a supplemental brief responding to the three uncertified issues raised in petitioner's Opening Brief. Respondent submitted a supplemental brief on November 17, 2010, and petitioner filed a supplemental brief in reply on November 24, 2010.

On December 15, 2010, the Ninth Circuit filed an unpublished Memorandum Disposition ("Memorandum"), affirming in part, and reversing and remanding in part. The Ninth Circuit held:

> (1) "[t]he California Court of Appeal's conclusion that [petitioner's] severance motion was properly denied by the trial court was not objectively unreasonable," and petitioner failed to point to "any specific trial rights that were violated as a result of the joint trial" (Memorandum at 2);
>
> (2) "[t]he California Court of Appeal's determination that the trial court's exclusion of battered women's syndrome evidence under California Evidence Code § 352 did not violate [petitioner's] due process rights was not objectively unreasonable," and the "Court of Appeal did not act objectively unreasonably by concluding that [petitioner] was not deprived of the opportunity to present a defense" (id. at 2-3); and

> (3) in concluding that petitioner's Grounds 5-11 in the SAP and Supplemental Grounds 1-4 were procedurally barred, the District Court "relied on a report and recommendation that erroneously concluded 'that the Ninth Circuit had found the *Dixon* rule to be an independent and adequate state law ground," and "[o]n appeal, [petitioner] presented evidence challenging the independence and adequacy of *In re Dixon* at the time of [petitioner's] procedural default" (*id.* at 3).

The Ninth Circuit then remanded the case to "permit [respondent] to submit evidence to the contrary, and for consideration by the district court in the first instance." The Ninth Circuit did not address the sleeping juror claim. (Memorandum at 3-4).

C. PROCEEDINGS POST-REMAND

Following receipt of the mandate filed on January 6, 2011, the Court ordered respondent to respond to petitioner's "evidence challenging the independence and adequacy of *In re Dixon* at the time of [petitioner's] procedural default;" petitioner was ordered to file a reply to that response. After numerous extensions of time, respondent filed its Response Re Independence and Adequacy of *In re Dixon* ("Response") on May 9, 2011, and petitioner filed her Reply to Response Re Independence and Adequacy of *In re Dixon* ("Reply") on August 5, 2011. Respondent also filed a Notice of Lodging ("Lodging re *Dixon*") with the Court, consisting of the evidence that petitioner first filed with the Ninth Circuit Court of Appeal on June 22, 2009 ("Lodgment 1") and "Minutes of

the California Supreme Court reflecting habeas corpus petition denials issued between August 3, 1998, and June 10, 2000" ("Lodgment 2").

Thus, the matter is deemed submitted and ready for a decision.

II.

PETITIONER'S CONTENTIONS[2]

1. The exclusion of evidence of petitioner's sexual relationship with her co-defendant, as well as expert testimony that she was a battered woman, violated her right to present a defense. (SAP ¶ 10(a)).

2. Petitioner's rights to due process and a fair trial were violated when the trial court refused to sever petitioner's trial from that of her co-defendant. (SAP ¶ 10(b)).

3. The trial court's refusal to instruct the jury that provocation could reduce the degree of murder was prejudicial error. (SAP ¶ 10(c)).

4. California's lying-in-wait special circumstance statute is unconstitutionally vague and overbroad. (SAP ¶ 10(d)).

5. Petitioner's due process rights were violated because her attorney prior to trial had a conflict of interest arising

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[2] A detailed Statement of Facts summarizing the evidence presented during petitioner's trial was contained in the Court's R&R and is included herein by reference.

from that counsel's prior representation of her co-defendant. (SAP at 6a; Trav. to SAP at 4-6).

6. Petitioner's due process rights were violated when she was "forced to testify" because her counsel had an "agreement" with the trial judge that the judge would permit an expert witness on BWS to testify only if petitioner had testified. (SAP at 6a; Trav. to SAP at 6-8).

7. Petitioner's due process rights were violated because she was sentenced to life without the possibility of parole after not accepting an offered plea deal. (SAP at 6a; Trav. to SAP at 8-9).

8. The prosecutor committed misconduct by introducing evidence, and arguing that petitioner was guilty, of "aiding and abetting" when petitioner was not charged under this theory Petitioner contends that she was "found guilty of an uncharged act." (SAP at 6a; Trav. to SAP at 9-10).

9. Petitioner's "right to be free of cruel and unusual punishment were [sic] violated when she was sexually assaulted by a deputy sheriff at the court house" "minutes" after the verdict. (SAP at 6a; Trav. to SAP at 10-12). Petitioner asserts that "an in-camera proceeding was held with the judge" the following day. (SAP at 6a). "[T]he judge asked [her] to be alone with this officer again, so that they could tape us together." (Trav. to SAP at 10). Petitioner also asserts that "two interviews" were conducted about her contacts with the officer prior to her sentencing. (Trav. to SAP at 11). Petitioner states that "she believes the jury was not aware of the court hearing about what happened." (Trav. to SAP at 11-12).

10. One of the jurors "nodded off several times during trial," violating her right to due process and a fair trial. Petitioner asserts that it was brought to the attention of the trial judge, who questioned the juror about her health and allowed the juror to retrieve some medication from her car. (SAP at 6a; Trav. to SAP at 12-13).

11. Petitioner claims that "jury misconduct" occurred when "two jurors were accosted in the restroom" and asked which trial they were working on. Petitioner claims that the incidents placed "additional pressure on them to perform," although the jurors reported that they did not answer the questions. Petitioner contends this violated her right to a trial by an impartial jury. (SAP at 6a; Trav. to SAP at 13-14).

Sup. Ground 1. Petitioner's federal due process rights and her right to remain silent were violated when petitioner "was never properly placed under arrest" and was not advised of her Miranda rights. (SAP Sup. at 3; Trav. to SAP Sup. at 4-6).

Sup. Ground 2. The prosecution systematically excluded "all female jurors," violating petitioner's federal due process rights and her right to an impartial jury. (SAP Sup. at 4; Trav. to SAP Sup. at 6-7).

Sup. Ground 3. An alternate juror committed misconduct by "tainting" the jury with an exclamation. (SAP Sup. at 5; Trav. to SAP Sup. at 8-9).

Sup. Ground 4. Petitioner's federal due process rights were violated by the exclusion of evidence relevant to petitioner's defense, which was found to be unduly

prejudicial to her co-defendant, and by the introduction at the joint trial of the "almost confession" of her co-defendant. (SAP Sup. at 6; Trav. to SAP Sup. at 9-11).

III.

DISCUSSION

A. SCOPE OF THE MANDATE

For the reasons explained below. the Court finds that the scope of the mandate is as follows: Whether *In re Dixon* was an adequate and independent state law basis on which to find that petitioner's Grounds 5-11 of the SAP and Supplemental Grounds 1-4 are procedurally barred.

In her appeal to the Ninth Circuit, petitioner raised four issues: (1) whether Grounds 5-11 of the SAP and Supplemental Grounds 1-4 are procedurally defaulted; (2) whether the trial court's refusal to sever the trial deprived her of a fair trial; (3) whether her right to present a defense was violated concerning the BWS evidence; and (4) whether her right to a fair trial was violated because a juror fell asleep. Of these, only Issue (1) was certified on appeal, and Issues (2), (3), and (4) fell outside the Certificate of Appealability.

In its remand order, with respect to Issue (1) concerning the procedural default bar, the Ninth Circuit stated that, "[o]n appeal, [petitioner] presented evidence challenging the independence and adequacy of In re Dixon at the time of [petitioner's] procedural default," and remanded with instructions to "permit [respondent] to submit evidence to the contrary, and for consideration by

the district court in the first instance." (Memorandum at 3-4).

The Ninth Circuit decided petitioner's Issue (2) and Issue (3) on the merits.[3] The Ninth Circuit did not reach the merits of Issue (4) regarding the sleeping juror. However, as discussed herein, because this Court previously found that Issue (4) -- which corresponds to Ground 10 of the SAP -- was procedurally barred, Issue (4) falls within the scope of the mandate concerning the dismissal of the procedurally barred claims.

Accordingly, the threshold question before the Court is whether Grounds 5-11 of the SAP and Supplemental Grounds 1-4 are procedurally barred. Because, as set forth below, the Court finds that California's Dixon rule is an independent and adequate state procedural rule, and continues to recommend that petitioner's Grounds 5-11 of the SAP and Supplemental Grounds 1-4 be dismissed as procedurally barred, the Court need not reach the merits of Issue (4), or any of the barred claims.

B. FEDERAL LAW ON PROCEDURAL DEFAULT

In order for a claim to be procedurally defaulted for federal habeas corpus purposes, the opinion of the last state court rendering a judgment must "clearly and expressly" state that its judgment rests on a state procedural bar. *See Harris v. Reed*, 489 U.S. 255, 263, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989). Further, "the

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[3] Issue (2) corresponds to Ground 2 of the SAP, while Issue (3) corresponds in part to Ground 1 of the SAP. The Ninth Circuit in its mandate affirmed the judgment of the District Court in denying Grounds 1 and 2 of the SAP on the merits.

application of the state procedural rule must provide 'an adequate and independent state law basis' on which the state court can deny relief." *Park v. California*, 202 F.3d 1146, 1151 (9th Cir.), *cert. denied*, 531 U.S. 918 (2000), quoting *Coleman v. Thompson*, 501 U.S. 722, 729-30, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). "For a state procedural rule to be 'independent,' the state law basis for the decision must not be interwoven with federal law." *La Crosse v. Kernan*, 244 F.3d 702, 704 (9th Cir. 2001); *see Morales v. Calderon*, 85 F.3d 1387, 1393 (9th Cir.1996). In order for a procedural bar to be adequate, state courts must employ a "firmly established and regularly followed state practice." *Ford v. Georgia*, 498 U.S. 411, 423-24, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991).

In determining whether a rule is adequate to bar federal review, courts utilize a burden-shifting analysis. In *Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir. 2003) (en banc), the Ninth Circuit held that, "once the state has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense, the burden to place that defense in issue shifts to the petitioner." The Ninth Circuit observed that a petitioner could satisfy this burden "by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule." *Id.* Once the petitioner has placed a procedural rule in issue, "the ultimate burden of proving the adequacy of the [rule] is upon the [s]tate." *See id.* at 585-86.

If a state procedural ground is found to be independent and adequate, federal habeas review of the claim is barred unless petitioner can demonstrate cause for her

procedural default and actual prejudice as a result of the alleged violation of federal law. *See Coleman*, 50 1 U.S. at 750; *Smith v. Baldwin*, 510 F.3d 1127, 1146 (9th Cir. 2007), cert. denied sub nom., *Smith v. Mills*, 555 U.S. 830 (2008); *Bennett*, 322 F.3d at 580; *Park*, 202 F.3d at 1150. To satisfy her burden of demonstrating "cause" for the procedural default, petitioner must show "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. 'Ed. 2d 397 (1986).

The Supreme Court has recognized an exception to the requirement that petitioner demonstrate both "cause" and "prejudice," where petitioner can demonstrate that failure to consider the procedurally defaulted claims will result in a fundamental miscarriage of justice because she is actually innocent of the crimes of which she was convicted. *See, e.g., Murray*, 477 U.S. at 496; *Noltie v. Peterson*, 9 F.3d 802, 806 (9th Cir. 1993). In order to qualify for this "miscarriage of justice" exception, however, petitioner must "support [her] allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) (recognizing that such evidence "is obviously unavailable in the vast majority of cases"). Further, to meet the requisite standard that a constitutional violation probably has resulted in the conviction of one who is actually innocent, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence." 513 U.S. at 327

C. APPLICABILITY OF THE DIXON RULE

1. California's *Dixon* rule

At issue in this case is whether the procedural rule from *In re Dixon* bars federal review of petitioner's claims (*i.e.*, Grounds 5-11 of the SAP and Supplemental Grounds 1-4). The *Dixon* rule is applied by California courts to bar claims "raised on habeas corpus if they should have been, but were not, raised on appeal." *Seaton*, 34 Cal. 4th at 201 n.4 (discussing the application of *Waltreus*, *Dixon*, and *Harris*). The bar is applied, with certain exceptions, when it is "apparent from the record as a whole that the matters of which petitioner complains were before the trial court." *Dixon*, 41 Cal. 2d at 762. The California Supreme Court in *Dixon* held that a petitioner "is not entitled in [a habeas] proceeding to a consideration of claims which are based upon his version of the conflicting evidence and which could have been, but were not, raised on appeal." *Id.* In a later proceeding, the California Supreme Court, in *In re Robbins*, 18 Cal. 4th 770, 814 n.34, 77 Cal. Rptr. 2d 153, 959 P.2d 311 (1998), explained that:

> When a petitioner attempts to avoid the bars of *Dixon* or *Waltreus* by relying upon an exhibit (in the form of a declaration or other information) from outside the appellate record, we nevertheless apply the bar if the exhibit contains nothing of substance not already in the appellate record.

2. Petitioner's claims to which the *Dixon* rule applies

Preliminarily, the Court must determine to which of petitioner's claims the *Dixon* rule applies.

As stated above, in order for a claim to be procedurally defaulted, the last state court to have considered the claim must "clearly and expressly" indicate that its judgment rests on a state procedural rule. *See Harris*, 489 U.S. at 263. Here, the California Supreme Court denied petitioner's habeas petition on December 1, 2004, with citations to *Waltreus*, *Dixon* and *Seaton*. The judgment of the District Court from which petitioner appealed adopted this Court's R&R, which found (R&R at 18):

> The Court concurs with respondent that petitioner's formerly unexhausted claims (her Grounds 5-11 and her Sup. Grounds 1-4) were readily apparent from the appellate record. Further, petitioner did not raise any of these claims in her direct appeal. (*Compare* Motion, Ex. D, *with* Return to SAP, Ex. C). Therefore, these claims fall squarely within the scope of California's *Dixon* rule.

On appeal to the Ninth Circuit, petitioner argued that the California Supreme Court's order denying her state court habeas petition is ambiguous because it cited three cases, *Waltreus, Dixon*, and *Seaton*. Petitioner contended that the citation to "*Waltreus* is not on point" because none of the claims in her state court habeas petition had even been raised on appeal. (Opening Brief at 19-21).

Further, petitioner argued that the Supreme Court's order is ambiguous because *Seaton* "stands for the proposition that a petitioner should not be able to raise on habeas appeal [sic] claims that could have been presented at trial." But petitioner did not argue which of her claims she contended are subject to *Seaton* but not *Dixon*. (Opening Brief at 22). Petitioner then argued that, while some of her claims could have been raised on direct appeal (but as petitioner concedes were not), the *Dixon* rule was not consistently applied at the relevant time. (Opening Brief at 22-23). In response to petitioner's Opening Brief, respondent argued to the Ninth Circuit that the *Dixon* rule applied to petitioner's claims previously found by this Court to be procedurally barred because they all," arose during [her] trial and were apparent from the record." (Respondent's Brief on Appeal at 14). In its Memorandum, the Ninth Circuit observed that the District Court had found that petitioner's claims were procedurally barred under the *Dixon* rule. As set forth above, the Ninth Circuit remanded the case to this Court only for a consideration of evidence of "the independence and adequacy of *In re Dixon* at the time of [petitioner's] procedural default." (Memorandum at 3).

Notwithstanding the limitations of the Ninth Circuit's remand, in its Response re Independence and Adequacy of *In re Dixon*, respondent now contends herein for the first time that the California Supreme Court's reference in its summary denial to *Waltreus "pertained to only two of petitioner's fourteen state hab*eas grounds," and that all of petitioner's other claims were "barred by the Dixon rule." (Response at 3 n.2; see Return to SAP, Ex. D).[4]

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[4] In its initial briefing herein, respondent previously contended that all of the claims raised in petitioner's SAP were "known to

Specifically, respondent asserts that the California Supreme Court's citation to *Waltreus* arguably could have been applicable to petitioner's Ground 6 (claiming that an agreement between counsel and the trial court forced petitioner to testify in order to permit expert testimony on BWS) because the Court of Appeal on direct appeal held that the trial court did not improperly exclude evidence pertaining to BWS. (Response at 9-10). Respondent also argues that the citation to *Waltreus* arguably was applicable to petitioner's Supplemental Ground 4 (claiming that petitioner's due process rights were violated by the exclusion of evidence prejudicial to her co-defendant and by the admission of a statement by her co-defendant) because the Court of Appeal held on direct appeal that the denial of petitioner's severance motion was not improper. (Response at 10). Additionally, respondent now asserts in two separate footnotes that, with respect to petitioner's Ground 9 and apparently with respect to her Supplemental Ground 1, "[t]o the extent that this claim was not apparent from the record, it would not be barred by *Dixon*," but that the California Court of Appeal rejected those claims on other procedural grounds when they were raised in petitioner's state court habeas petition to that court. (Response at 11 n.4, at 12 n.5). Finally, respondent asks this Court to "deem[] petitioner's Grounds 5, 7, 8; 10, and 11 and Supplemental Grounds 2, 3, and 4[5] to be procedurally defaulted" under *Dixon*. (Response at 22).

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petitioner at the time of trial" and "were readily discoverable from the trial record." In addition, respondent previously contended that the Dixon rule "adheres when the claims arise during trial and are apparent from the record." (Return to SAP, Mem. at 5-6; Supplemental Return to SAP at 3).

[5] It is not clear what respondent is asking this Court to find concerning Ground 6, Ground 9, and Supplemental Ground 1,

In her Reply, petitioner now asserts that, as "acknowledged" by respondent, the "*Dixon* bar clearly does not apply to at least two of [petitioner's] claims dismissed on procedural grounds. As briefing herein is limited to the adequacy and independence of *Dixon*, the merits of those claims will be addressed in any further briefing this Court allows." (Reply at 6 n.4). The Court notes that petitioner fails to specify which of the claims she now asserts the *Dixon* bar does not apply to. Further, the Court notes that petitioner previously has addressed the merits of all of her claims raised in the SAP as well as her four Supplemental Grounds. (*See* Trav. to SAP and Trav. to Sup. Return).

As noted above, in its R&R, the Court concurred with respondent's previous contention that petitioner's Grounds 5-11 and her Supplemental Grounds 1-4 were readily apparent from the appellate record, and that the California Supreme Court's citation to *Dixon* in its rejection of petitioner's state court habeas petition was applicable to all of the claims that petitioner raised in her habeas petition to the California Supreme Court. (R&R at 17-18). As the Court herein interprets the Memorandum of the Ninth Circuit to have rejected petitioner's argument raised on appeal that the California Supreme Court's procedural bar was ambiguous and was not clearly and expressly stated with respect to these claims, the Court will address the four claims to which

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Respondent asserts that Supplemental Ground 4 was arguably barred by *Waltreus*, but then asks the Court to find the claim to be procedurally barred by *Dixon*. It offers no explanation as to why it does not raise this same *Dixon* bar argument for Ground 6, the other claim that respondent asserts was arguably barred by *Waltreus*. In any event, as discussed herein, the *Dixon* bar is applicable to all of these claims.

respondent now points as possibly falling outside the scope of the *Dixon* bar, *i.e.*, Ground 6, Ground 9, Supplemental Ground 1 and Supplemental Ground 4.

The *Dixon* rule is applied by California courts when it is "apparent from the record as a whole that the matters of which petitioner complains were before the trial court." *Dixon*, 41 Cal. 2d at 762. In this case, petitioner's relevant habeas petition to the California Supreme Court raising the claims that the Court found to procedurally barred does not reference any evidence outside of the record on appeal. (*See* Return to SAP, Ex. C). Similarly, petitioner does not reference any evidence outside of the record on appeal in the corresponding claims raised herein. Examining the record as a whole at the time that petitioner's appeal was filed, the Court finds that all of the claims in question, petitioner's Grounds 5-11 and her Supplemental Grounds 1-4, were apparent from the record and could have been raised on appeal.

Specifically. with respect to the four claims to which respondent points, in Ground 6, petitioner claims that she was "forced" to testify because her counsel told her that her expert would not be permitted to testify about BWS if petitioner did not first testify. Petitioner also claims that her counsel did not advise her that she had the right to refuse to testify (Trav. to SAP at 6-7). As set forth in the R&R, the trial record reflects that petitioner's counsel sought to introduce evidence of BWS prior to trial, but the trial court ruled that the evidence was not admissible. During petitioner's testimony, petitioner's trial counsel again sought to introduce evidence that petitioner was a battered woman to explain why petitioner met her co-defendant on the night of the murders, and why she

stayed with him following the murders. The trial court found that the evidence was not relevant and ruled that "[i]f the theory of [petitioner's defense] is 'I had nothing to do with the killings of those two women,' what you're talking about is not relevant." Petitioner's trial counsel made subsequent attempts to introduce evidence of BWS to rebut evidence that petitioner was in control of the relationship, and to rebut evidence suggesting that her memory loss was selective, but these attempts also were rejected by the trial court. (*See* R&R at 22 (citing RT at 9458)). Therefore, the record reflects that the issue of the relevancy of expert testimony on BWS to petitioner's possible defense, as well as the potential admissibility of that testimony if petitioner testified, was apparent from the record. Petitioner has never cited any evidence outside of the record at the time of her direct appeal to support the existence of any agreement between the trial judge and her counsel. Nor does petitioner point to any evidence outside the record that she was not advised regarding her right not to testify. Accordingly, because it is clear that petitioner's Ground 6 is based on facts that were apparent from the record as a whole and that the matters of which petitioner complains in this claim were before the trial court, this claim could have been raised on direct appeal.

With respect to petitioner's Ground 9, the claim arises from an assault by a sheriff's deputy that petitioner alleges took place in the courthouse after the verdict was reached. Petitioner asserts that her counsel brought the assault to the attention of the trial court and a proceeding was held with the trial judge the day after the assault allegedly occurred. (SAP at 6a; Trav. to SAP at 10-12). Again, the record reflects that the matters of which

petitioner complains in this claim were before the trial court and were known at the time of her direct appeal. To the extent that petitioner may be contending that the facts were not apparent in the record on appeal, petitioner has failed to point to any substantive evidence outside the record that she alleges is relevant to this claim. Moreover, petitioner has acknowledged that "she believes the jury was not aware of the court hearing about what happened." (Trav. at 11-12). Federal habeas relief only is available if petitioner contends that she is in custody in violation of the Constitution or laws or treaties of the United States. *See* 28 U.S.C. § 2254(a); *see also Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); *Smith v. Phillips*, 455 U.S. 209, 221, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) ("A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution."). Here, as set forth in her SAP, petitioner's Ground 9 does not pertain to any aspect of her trial, the jury's verdict, or her sentence, and, as such, it does not even purport to state a claim that is cognizable on habeas review. Accordingly, to the extent that Ground 9 potentially could give rise to a federal habeas claim, the facts from which such a claim would arise were contained in the record at the time of petitioner's appeal and such a claim could have been raised on direct appeal.

With respect to petitioner's Supplemental Ground 1, petitioner's claim pertains to the circumstances surrounding her arrest. Once again, petitioner points to nothing outside the record on appeal in support of this

claim, the facts of which were known to petitioner prior to the time of her direct appeal. Accordingly, facts from which this claim arose were contained in the record at the time of petitioner's appeal and the claim could have been raised on direct appeal.

With respect to petitioner's Supplemental Ground 4, petitioner claims that her federal due process rights were violated by the exclusion of evidence relevant to petitioner's defense and by the introduction at the joint trial of the "almost confession" of her co-defendant. (SAP Sup. at 6; Trav.to SAP Sup. at 9-11). Petitioner appears to argue that she was unable to cross examine her co-defendant because he did not testify and that she was prevented from introducing some evidence in her own defense because it was found to be too prejudicial to her co-defendant. (Trav to SAP Sup. at 10-11). On direct appeal, petitioner argued that the trial court's denial of petitioner's repeated severance motions during trial resulted in the admission of highly prejudicial evidence against petitioner, that the two defendants had "mutually antagonistic defenses," and that evidence favorable to petitioner was excluded because it was found to be unduly prejudicial to petitioner's co-defendant. (Appellant's Opening Brief on direct appeal at 56-61). Once again, petitioner does not point to any evidence supporting this claim that was not contained within the record on appeal. Accordingly, because petitioner's Supplemental Ground 4 is based on facts that were apparent from the record as a whole at the time of petitioner's direct appeal, and the matters of which petitioner complains in this claim were before the trial court, this claim could have been raised on appeal.

Therefore, the Court once again finds that petitioner's Grounds 5-11 and her Supplemental Grounds 1-4 all fall within the scope of California's *Dixon* rule because all of her claims arise from facts that were apparent from the record as a whole and the "matters of which petitioner complains were before the trial court." *Dixon*, 41 Cal. 2d at 762.

D. *BENNETT'S* BURDEN-SHIFTING SCHEME[6]

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[6] The Court reject's respondent's unsupported assertions in its Response that the Supreme Court in *Walker v. Martin*, 131 S. Ct. 1120, 179 L. Ed. 2d 62 (2011), "implicitly overruled *Bennett's* three-step burden-shifting process," and that respondents no longer bear the ultimate burden of proving the adequacy of a procedural bar. (Response at 7). The Supreme Court's decision in *Martin* on February 23, 2011, did not address the burdens applicable to such an analysis. Further, the Supreme Court in *Martin* cited *Bennett* on the "independence" of California's timeliness rule without any indication of disapproval. *See Martin*, 131 S. Ct. at 1127 ("Martin does not here dispute that the time limitation is an 'independent' state ground." (citing *Bennett*, 322 F.3d at 582-83)). Finally, the Ninth Circuit has referenced *Bennett's* burden-shifting approach in a case decided after the Supreme Court's decision in *Martin*. *See Ybarra v. McDaniel*, 656 F.3d 984, 991 n.2 (9th Cir. 2011) (in an opinion filed Sept. 6, 2011, noting that, pursuant to *Bennett*, "the State has the ultimate burden of proving the adequacy of a procedural rule once a petitioner puts the rule at issue"); *see also Corbray v. Miller-Stout*, 2012 WL 605692, at *1 (9th Cir. Feb. 27, 2012) (citing *Bennett* for its "reasoning that '[o]nce the state has adequately pled the existence of an independent and adequate state procedural ground' the remaining issues shift to the petitioner") (now citable for its persuasive value pursuant to Ninth Circuit Rule 36-3). *Foster v. Evans*, 426 Fed.Appx. 523, 524 (9th Cir. 2011) (in an unpublished opinion filed April 11, 2011, finding that petitioner "did not meet his burden of 'asserting specific factual allegations that demonstrate the inadequacy of the state procedure.'" (citing *Bennett*)) (now citable for its persuasive value pursuant to Ninth Circuit Rule 36-3). This Court is bound by the Ninth Circuit's holding in *Bennett* in the absence of an intervening

As discussed *supra*, under *Bennett's* burden-shifting scheme, once respondent "has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense," the burden shifts to petitioner to "demonstrate the inadequacy of the state procedure." *Bennett*, 322 F.3d at 585-86. The ultimate burden of proving the adequacy of the procedural rule, however, rests upon respondent. *Id.*

1. **Petitioner's initial burden**

Petitioner contends that the Ninth Circuit "implicitly found that petitioner had made sufficient specific allegations challenging *Dixon's* adequacy and independence when it remanded the case with the burden on Respondent to prove the bar." (Reply at 3 n.2).

In its Memorandum, the Ninth Circuit acknowledged that petitioner had "presented evidence challenging the independence and adequacy" of Dixon and directed the "district court to permit [respondent] to submit evidence to the contrary, and for consideration by the district court in the first instance." (Memorandum at 3-4). Giving petitioner the benefit of any doubt, the Court will assume without deciding that the Ninth Circuit found petitioner's evidence pertaining to the independence and adequacy of the *Dixon* rule sufficient to meet her burden under *Bennett* to place that defense in issue.

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contrary Supreme Court decision or an en banc Ninth Circuit decision on point and to the contrary.

a. petitioner's evidence challenging Dixon's adequacy

Petitioner contends that the *Dixon* rule was not "firmly established and regularly followed on the date of [petitioner's] default." (Reply at 15 (internal quotation marks omitted)). Petitioner argues that "there is evidence that clearly shows that *Dixon* was not being applied in the vast majority of cases at the time of [petitioner's] alleged default." (*Id.* at 8). Petitioner then contends:

> In an order list issued by the California Supreme Court on December 21, 1999 -- six months **after** [petitioner's] default – the California Supreme Court denied approximately 210 habeas corpus petitions and only invoked the *Dixon* bar in about nineteen of them, less than ten percent of its habeas denials. Because a much, much larger percentage of primarily non-capital habeas petitions would likely have included record-based claims, the sparsity of citation to *Dixon* reveals clear lack of consistency and regularity in the application of the bar.

(*Id.* at 9 (emphasis added, internal citations omitted)). Although petitioner acknowledges that the relevant period in which the adequacy of *Dixon* must be evaluated is the time "leading up to [petitioner's] filing of her direct appeal," which was filed on June 10, 1999 (Reply at 8), petitioner presents evidence only for one random day six months after the relevant default date without providing any explanation of the significance of the day that she selected for her analysis.

In addition, petitioner presents more detailed information from what she characterizes as a "small sample of cases from" the list of 210 habeas cases denied by the California Supreme Court on December 21, 1999. Within the nine cases that petitioner cites, without explaining her sampling methodology, petitioner contends that "there are many cases where the state court did not invoke the *Dixon* bar even though the petitions presented record-based claims that could have been raised on direct appeal but were not." (Id. at 11-12). Petitioner argues that her evidence that these nine cases she selected were "denied on the merits amply demonstrates that, in actual practice, the California Supreme Court did not apply the *Dixon* bar between August of 1998 and December of 1999 with the consistency required to bar federal" habeas review. (*Id.* at 12).

Petitioner additionally argues that the *Dixon* bar is inadequate because "federal courts that have examined the practices of the California courts have found that the *Dixon* bar was not being applied in the 'vast majority of cases' in the years following the California Supreme Court's latest attempt (*i.e.*, in *Robbins*) to establish the rule's parameters and give it effect." (Reply at 13). Petitioner then cites two cases, both of which concern relevant dates of default that were **before** the California Supreme Court's 1998 decision in *Robbins* (*id.*).[7] *See*

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[7] In *Robbins*, the California Supreme Court explicitly held that it would no longer evaluate whether an error alleged in a state habeas petition constituted a federal constitutional violation. In other words, the California Supreme Court held that, when finding a claim to be procedurally defaulted subsequent to *Robbins*, it would do so solely upon state law grounds. *Id.* Thereafter, in *Bennett*, the Ninth Circuit applied the California Supreme Court's holding in *Robbins* "prospectively," and held that "the California Supreme Court's post-

Carpenter v. Ayers, 548 F Supp. 2d 736, 756 (N.D. Cal. 2008) (the applicable default date was **1996 or early 1997**, either of which pre-dates the decision in *Robbins*); *Dennis v. Brown*, 361 F. Supp. 2d 1124, 1126, n.4, 1130, 1135 (N.D. Cal. 2005) (The case involves claims that were allegedly defaulted as untimely, successive, pretermitted, or repetitive; the claims denied as "pretermitted" were denied with a citation to *Dixon*. Those claims were purportedly defaulted on May 10, **1996**, and the district court concluded that the claims were not procedurally defaulted: "Because the underpinnings of the determinations reflected in such denials cannot be ascertained with any certainty on the record now before it, and because it must follow *Bennett*.").

Petitioner next argues: "Notably, when federal courts have examined California's application of *Dixon* in the post-*Robbins* era on the *basis of evidence from both the petitioner and the respondent*, they have invariably found the rule inadequate to bar federal habeas review." (Reply at 13-14 (emphasis added)). But the cases that petitioner cites do not support this assertion. Petitioner cites *Dennis*, 361 F Supp. 2d at 1130 (as noted above, the relevant default date was pre-*Robbins*), and five other district court cases. *See* Reply at 13 n.9 (citing *Rowland v. Lamarque*, 2009 WL 1668584, at *3 (E.D. Cal. June 15, 2009) (concluding that *Dixon* was not an adequate and independent rule because respondent "has not met his burden of demonstrating that the *Dixon* bar is 'adequate,'" without citing any evidence put forth by either party); *Gibbs v. Runnels*, 2009 WL 30296, at *3 (E.D. Cal. Jan. 6,

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Robbins denial of [petitioner's] state petition for lack of diligence (untimeliness) was not interwoven with federal law and therefore is an independent procedural ground." *Bennett*, 322 F.3d at 582-83.

2009) (again finding that respondent had not met its burden of demonstrating the adequacy of *Dixon* without citing any evidence put forth by either party); *Rodriguez v. Scribner*, 2008 WL 1365785, at *13 (E.D. Cal. Apr. 9, 2008) (same); *Wyrick v. Newland*, 2007 WL 760529, at *6 (N.D. Cal. Mar. 9, 2007) ("After *Robbins*, the question of whether the *Dixon* bar constitutes a bar to federal review is unsettled. Nevertheless, it is unnecessary to resolve this question in this case since the state has failed to meet its burden of proof in establishing the procedural bar in this case." (again without citing any evidence by either party)); *Monarrez v. Alameda*, 2005 WL 2333462, at *5-6 (C.D. Cal. Sept. 22, 2005) (the independence of the *Dixon* bar was not contested, but the court found that petitioner had met his "modest" burden of placing the adequacy of the rule in issue with evidence[8] of "his own survey of 210 non-capital habeas corpus petitions decided on December 21, 1999, just a month before the date of the purported default, showing inconsistent application of the *Dixon* rule by the California Supreme Court in that the *Dixon* bar was applied in only 19 cases, less than 10 percent of those decided", respondent then "did nothing to affirmatively demonstrate the adequacy of the *Dixon* rule," and the court found that respondent had failed to meet its burden of proving the adequacy of the procedural bar)). Notably, in only one of the cases cited by petitioner, *Monarrez*, did a petitioner put forward any evidence of the inadequacy of Dixon, and the respondent in *Monarrez* "did nothing," as that court stated. Further, the court in *Monarrez* added a footnote stating: "This is not to say that the *Dixon* bar could not be shown to be adequate for procedural default

[8] Petitioner here apparently used the same evidence as was presented in *Monarrez*.

purposes. It simply has not been done in this case." *Monarrez*, 2005 WL 2333462, at *6 n.7.

b. petitioner's evidence challenging *Dixon's* independence

Petitioner contends that the *Dixon* rule is not independent of federal law[9] because, even subsequent to the California Supreme Court's decision in *Robbins*, it is "clear that *Dixon* still lacks independence from federal law." (Reply at 16). Petitioner argues that the California Supreme Court in *Robbins* set forth the four exceptions it would consider to that bar, but did not state that it would make such determinations without considering federal law. Further, when the California Supreme Court later discussed the application of the *Waltreus* and *Dixon* rules in *Seaton*, it again failed to specify that the determination of whether a claim raised a constitutional error would be made without consideration of federal law. (*Id.* at 17-18). Petitioner contends that the Ninth Circuit's decision in *Park*, 202 F.3d at 1152-52, declined to decide whether the *Dixon* bar was independent post-*Robbins*. (*Id.* at 16). Petitioner asserts that, because the California Supreme

[9] The Court concurs with petitioner that respondent is incorrect that petitioner "implicitly concedes" the 'independence of the *Dixon* bar. (*See* Response at 12). In her Opening Brief to the Ninth Circuit, petitioner framed her Issue (1) as whether the *Dixon* rule was "consistently applied" and "independent of federal law." (*See* Opening Brief at 1, 26, 32; *see also* petitioner's Reply, at 7 n.5). The Ninth Circuit then remanded the case finding: "On appeal, [petitioner] presented evidence challenging the independence and adequacy of *In re Dixon* at the time of [petitioner's] procedural default." (Memorandum at 3). Accordingly, the Court finds that petitioner has not waived her claim that the *Dixon* rule is not independent of federal law.

Court has "failed to make clear that the *Dixon* rule's application is independent," this Court "must presume that [application of the rule] was based partially on federal grounds." (*Id.* at 18-19).

2. Respondent's ultimate burden[10]

a. respondent's evidence showing Dixon's adequacy

Respondent contends that the United States Supreme Court's recent decision in *Walker v. Martin* holding that a "state procedural rule can adequately bar federal habeas review **even if** the state court exercises its discretion at times to disregard the rule and decide a habeas claim on its merits," is applicable to the *Dixon* rule. (Response at 6-7 (emphasis in original)). Respondent argues that the *Dixon* rule has been applied for over sixty years by California courts. Since 1993, respondent continues, when the California Supreme Court "reestablished" the application of its procedural bars in its decisions in *Clark* and Harris, the Dixon rule had been well-established and consistently applied by California Courts. *See Fields v. Calderon*, 125 F.3d 757, 760 (9th Cir. 1997) (discussing the *Dixon* bar), *cert. denied*, 523 U.S. 1132 (1998); (Response at 13). Federal district courts have found that Dixon is an adequate state procedural bar since that time, which was six years prior to petitioner's failure to raise her claims. *See, e.g., Protsman v. Pliler*, 318 F Supp. 2d

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[10] In its Response, respondent first argues that, "under *Martin*, respondent does not bear the ultimate burden of proving the [procedural] bar." (Response at 7). As discussed *supra*, fn. 6, the Court disagrees. Respondent, however, goes on to argue that it has satisfied its burden under *Bennett* by showing that the *Dixon* bar was independent, firmly established, and regularly followed at the time of petitioner's default. (*Id.* at 7-8).

1004, 1007-08 (S.D. Cal. 2004) (finding *Dixon* bar applied post-1998 to be both adequate and independent of federal law); *Ngoun v. Adams*, 2006 WL 707406, at *9-11 (E.D. Cal. Mar. 21, 2006) (finding the *Dixon* bar was adequate on May 14, 1999); (Response at 13-14).

Further, respondent contends that the evidence that petitioner presented "in an effort to demonstrate the inadequacy of the *Dixon* bar actually illustrates its consistency and regularity." (Response at 14). As held by the Supreme Court in *Martin*, "a state procedural rule is no less firmly established simply because it is sometimes not applied." *Martin*, 131 S. Ct. at 1128; (Response at 14). It is only when a state court has "exercised its discretion in a surprising or unfair manner" that a state procedural ground should be found inadequate to preclude federal habeas relief. (Response at 14) (citing *Martin*, 131 S. Ct. at 1130).

Finally, respondent argues, consideration of petitioner's evidence together with that adduced by respondent demonstrates that the California courts regularly applied the *Dixon* bar at the time of petitioner's default. Petitioner's evidence pertaining to the allegedly inconsistent application of the *Dixon* bar on one selected day, December 21, 1999,[11] supports the fact that the procedural rule was consistently applied in the relevant time period. Petitioner's data reflect that approximately

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[11] Respondent notes that petitioner's day for which she provided data -- which appears to be arbitrarily selected -- actually falls six months **after** petitioner's relevant default date of June 10, 1999, the day on which she filed her appellate brief on direct review and should have raised the claims to which the *Dixon* bar was later applied. (Response at 15).

ten percent of the habeas petitions decided by the California Supreme Court on that day referenced *Dixon*, but a majority of the habeas petitions (57%) were decided without citation of any procedural rule. (Response at 15-16). The additional data provided by respondent illustrate that, during a period of nearly two years, from August 3, 1998 (when the California Supreme Court decided *Robbins*), until June 10, 2000 (one year after petitioner had filed her appellate brief), the majority of habeas petitions decided by the California Supreme Court were denied without citation to any procedural rule and the *Dixon* bar was applied "on a predictable basis -- in roughly ten to fifteen percent of all denied habeas petitions." The average rate of denials citing Dixon during the entire period examined by respondent was slightly over twelve percent, which is consistent with the data adduced by petitioner for the one day that she selected. (Response at 19-20). Respondent contends that the data show that, in the over 4,700 habeas petitions denied by the California Supreme Court during the period examined, the *Dixon* bar was firmly established and regularly followed. Petitioner's small sampling of specific cases is not to the contrary because the nine cases that she "hand-selected" include several petitions raising claims of ineffective assistance of counsel, which is more appropriately raised in a habeas petition rather than on direct appeal, and three of the petitioners had pleaded guilty, which significantly restricted their right to appeal under California law. (Response at 16-18, 20).

In her Reply, petitioner objects to respondent's application of the Supreme Court's holding in *Martin* on the basis that the *Dixon* rule is "mandatory" and not discretionary, and because the decision in *Martin*

"explicitly limited the scope [of the holding] to the adequacy of California's discretionary timeliness rule." (Reply at 2-4). Petitioner argues that "[f]or mandatory rules the analysis remains unaltered from that in the previous case law, as is shown by the post-*Martin* application of traditional adequacy-and-independence analysis in other courts." (Reply at 5 (citing only *Lark v. Secretary Pa. Department of Corr.*, 645 F.3d 596 (3rd Cir. 2011)). Accordingly, petitioner asserts, *Martin* did not mandate a "new method of analysis of adequacy on [sic] every procedural bar, including the *Dixon* bar," and the "burden remains on respondent to prove *Dixon's* adequacy at the time of [petitioner's] alleged default." (Reply at 6).

b. respondent's evidence showing *Dixon's* independence

Respondent contends that, since the California Supreme Court's decision in *Robbins* on August 3, 1998, a California court's determination of whether an exception applies to the *Dixon* bar is independent of federal law. Respondent cites *Park* and several district court cases holding that the application of *Dixon* is independent of federal law (Response at 12-13).

c. petitioner makes no showing of cause and prejudice to excuse her default

Respondent contends that this Court previously determined that petitioner neither showed cause for her procedural default nor demonstrated that barring the defaulted claims would create a fundamental miscarriage of justice. Accordingly, respondent argues that the Court

should once again find that the claims are procedurally barred. (Response at 21-22).

E. ANALYSIS

1. The Dixon rule is an adequate state law ground

First, the Court rejects petitioner's argument that the Supreme Court's decision in *Martin* has no relevance to a *Dixon* bar. Rather, the Court concurs with respondent that the Supreme Court's holding in *Martin* is not narrowly confined to California's timeliness rule. Prior to *Martin*, the Supreme Court held that "a discretionary rule can serve as an adequate ground to bar federal habeas review," and that a rule may be adequate "even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Beard v. Kindler*, __ U.S. __, 130 S. Ct. 612, 618, 175 L. Ed. 2d 417 (2009); *see also Martin*, 131 S. Ct. at 1128-29. As the Supreme Court recently observed in *Martin*, 131 S. Ct. at 1130, "[d]iscretion enables a court to home in on case-specific considerations and to avoid the harsh results that sometimes attend consistent application of an unyielding rule." Such discretion is applicable to the *Dixon* rule because a state court may find that special circumstances excuse a petitioner's failure to raise a ground on appeal. *See, e.g., Fleeman v. Castro*, 2009 WL 33241, at *7 (E.D. Cal. Jan. 6, 2009) (the *Dixon* rule is "discretionary in that it admits of the possibility of exceptions for 'special circumstances constituting an excuse' for failure to raise a claim by way of direct appeal and when such circumstances are found, the California Supreme Court may entertain the claim");

Jones v. Ayers, 2008 WL 906302, at *28 (E.D. Cal. Mar. 31, 2008) (finding the *Dixon* rule to be discretionary because, as set forth in *Park*, 202 F.3d at 1152, the California Supreme Court explained in *Harris* that exceptions are applicable to the *Dixon* rule that admit the possibility that the California Supreme Court may entertain a claim not raised on direct appeal). Accordingly, the Court may look to the Supreme Court's recent decision in *Martin* for guidance in evaluating the adequacy of the state courts' application of the Dixon rule. *See, e.g., Jensen v. Hernandez*, 2012 WL 1130599, at *11-12 (E.D. Cal. Mar. 30, 2012) (citing *Martin* in considering, in part, a *Dixon* bar); *Peyton v. Lopez*, 2012 WL 1203484, at *7 (C.D. Cal. Feb. 22, 2012) (same).

Second, to be "adequate," the procedural rule in question must be "firmly established and regularly followed." *Martin*, 131 S. Ct. at 1127 (citing *Kindler*, 130 S. Ct. at 618). "In determining the adequacy of the procedural bar, state cases applying the procedural bar **after the time** of the petitioner's default are irrelevant." *Bennett v. Mueller*, 364 F. Supp. 2d 1160, 1167 (C.D. Cal. 2005) (on remand, citing *Cockett v. Ray*, 333 F.3d 938, 943 (9th Cir. 2003)) (emphasis added). Here, petitioner's only evidence of purported inadequacy pertains to a day that falls six months after petitioner's default Respondent, however, has adduced evidence for the six-month period up to and including June 1999, the month in which petitioner filed her brief on direct appeal. According to respondent's evidence for these six months, the California Supreme Court denied 1,513 habeas petitions, of which 178, or approximately 12 percent, were denied with citations to *Dixon*. (Response at 20).

Petitioner claims that the *Dixon* bar is not adequate because, on the one day for which she presents evidence, only about 10% of the habeas denials cited Dixon. Petitioner adduces no evidence to support her speculation that "a much, much larger percentage of primarily non-capital habeas petitioners would likely have inducted record-based claims." Petitioner argues that "[l]ogically, convicts untrained in the law would have thrown into a petition any claim that seemed potentially meritorious, with little thought or understanding as to whether the claim was record-based." From this unsupported speculation, petitioner concludes that the fact that the *Dixon* bar was cited only "one time out of ten indicates a distinct lack of thoroughness in the court's review and a lack of regularity and consistency in the bar's application," rendering the *Dixon* rule inadequate. (Reply at 10-11). Petitioner's conclusion, however, is unsupported by any facts or evidence. No lack of thoroughness or inconsistency can be inferred from the number of times that the California Supreme Court cited *Dixon* on this one day absent some evidence of the number of times that claims to which the *Dixon* rule could apply were instead rejected on the merits on that same day. The *Dixon* rule is only applicable to "claimed errors [that] could have been, but were not, raised upon a timely appeal" (*Dixon*, 41 Cal. 2d at 759), and petitioner does not even purport to make a factual showing that more than ten percent of the habeas petitions denied on the day to which she points involved claims that could have fallen under the Dixon rule. Rather, taking into account the evidence provided by respondent pertaining to the relevant time period prior to petitioner's default, the California Supreme Court cited the Dixon rule in a consistent and regular percentage of the habeas petitions that it denied. The United States

Supreme Court has made it clear that a state procedural rule can serve as an adequate bar to federal habeas review "even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Kindler*, 130 S. Ct. at 618; *see also Martin*, 131 S. Ct. at 1128, 1129 ("We see no reason to reject California's time bar simply because a court may opt to bypass the [untimeliness] assessment and summarily dismiss a petition on the merits, if that is the easier path."). Moreover, as Judge Kozinski recently noted, there is no "existing Ninth Circuit precedent holding that the Dixon rule is inadequate." *Cree v. Sisto*, 2011 WL 66253, at *2 (E.D. Cal. Jan 7, 2011) (Kozinski, J., sitting by designation).

Finally, as in *Martin*, petitioner does not contend that "the California Supreme Court exercised its discretion in a surprising or unfair manner." *See Martin*, 131 S. Ct. at 1130. Nor is such a conclusion implied by the evidence adduced by petitioner and respondent of the California Supreme Court's application of the *Dixon* rule. Accordingly, the Court concurs with respondent that the evidence reflects that the *Dixon* rule was well established and regularly followed in a consistent percentage of the California Supreme Court's summary denials of habeas petitions in the time leading up to petitioner's default.

2. **The Dixon rule is an independent state law ground**

The Court rejects petitioner's argument that, even subsequent to the California Supreme Court's decision in *Robbins*, the application of *Dixon* "lacks independence from federal law," as well as petitioner's contention that

the Court should "presume" the application of Dixon is based on federal grounds despite the assertion of the California Supreme Court to the contrary. (Reply 6 at 16, 18-19). Rather, as the Ninth Circuit noted in Bennett, the Court must "respect the California Supreme Court's sovereign right to interpret its state constitution independent of federal law." Bennett, 322 F.3d at 582.

In *Park*, the Ninth Circuit stated that: "We do not decide here whether *Robbins* establishes the independence of California's *Dixon* rule for the future," because the default in question in that case occurred **prior** to the decision in *Robbins*. *Park*, 202 F.3d at 1153. But the Ninth Circuit noted that "[t]he California Supreme Court has adopted in *Robbins* a stance from which it will now decline to consider federal law when deciding whether claims are procedurally defaulted." 202 F.3d at 1152. Subsequently, in *Bennett*, the Ninth Circuit discussed the California Supreme Court's decision in *Robbins* with respect to both the *Dixon* bar and California's untimeliness rule. The Ninth Circuit then held that a post-*Robbins* denial of a state habeas petition for untimeliness "was not interwoven with federal law and therefore is an independent procedural ground." *Bennett*, 322 F.3d at 581-83. Several district court cases have subsequently found that the Ninth Circuit's reasoning in *Bennett* is equally applicable to *Dixon*. *See, e.g.*, *Milligan v. Ahlin*, 2011 WL 5040716, at *9 (E.D. Cal. Oct. 21, 2011) (applying the reasoning of *Bennett* to the invocation of the *Dixon* rule after *Robbins*); *Gaddy v. Hedgpeth*, 2011 WL 2433673, at *10 (E.D. Cal. Jun. 14, 2011) (finding that a post-*Robbins* invocation of the *Dixon* rule is independent: "[a]lthough *Bennett* did not involve the *Dixon* rule per se, its rationale applies with equal

force to a post-*Robbins* application of the *Dixon* bar because the *Dixon* bar and the untimeliness bar are both subject to analogous constitutional error exceptions and state court consideration of post-*Robbins* applications of these bars no longer involves federal law"); *Cree*, 2011 WL 66253, at *2 (holding that the "*Dixon* rule is independent, because it is applied without any consideration of federal law," and citing *Protsman*, 318 F.Supp.2d at 1006-08); *Jones v. Ayers*, 2008 WL 4472888, at *27 (E.D. Cal. Sept. 30, 2008) (concluding that *Dixon* is an independent bar subsequent to *Robbins* because "the logic of *Bennett*, which is based on *Robbins*, applies equally to *Dixon* defaults as it does to timeliness defaults"); *Protsman*, 318 F.Supp.2d at 1007-08 (citing the Ninth Circuit's decision in *Bennett* that the California Supreme Court's assertion in *Robbins* that it would no longer consider federal law in determining whether to apply a state procedural rule was sufficient to render California's timeliness rule independent post-*Robbins*, finding that the reasoning applied by the Ninth Circuit in *Bennett* "also applies to the application of the *Dixon* bar," and holding that the *Dixon* rule is an independent procedural bar post-*Robbins*); *see also Rhodes v. Uribe*, 2012 WL 928434, at *4 (C.D. Cal. Feb. 10, 2012) (finding that the *Dixon* rule was independent and adequate); *Cantrell v. Evans*, 2010 WL 1170063, at *13-14 (E.D. Cal. Mar. 24, 2010) (finding *Dixon* to be independent and adequate state procedural ground) (McKeown, J., sitting by designation).

Accordingly, the Court finds that respondent has carried its burden of showing that the *Dixon* rule was independent of federal law at the time the California Supreme Court applied it to petitioner's Grounds 5-11 in the SAP and her Sup. Grounds 1-4.

3. Petitioner has failed to show cause and prejudice

The Court previously found in its R&R that petitioner had not even purported to assert that any objective factor prevented her from raising her claims in accordance with the state's procedural rules. Because petitioner must demonstrate both cause and prejudice, once petitioner failed to show cause, the Court had no need to reach the issue of whether petitioner had satisfied her burden of demonstrating the requisite "prejudice." *See Murray*, 477 U.S. at 494; *Thomas v. Lewis*, 945 F.2d 1119, 1123 n.10 (9th Cir. 1991); (R&R at 20-21). Once again, post-remand, petitioner does not even purport to argue that any objective factor prevented her from raising her claims in accordance with the state's procedural rules, nor does she argue herein that the failure to consider the procedurally defaulted claims will result in a fundamental miscarriage of justice.[12] As the Court previously found, to meet the requisite standard that a constitutional violation probably has resulted in the conviction of one who is actually innocent, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence." *Schlup*, 513 U.S. at 327 Once again, petitioner has not presented the kind of new reliable evidence described in *Schlup*, nor has she

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[12] On appeal to the Ninth Circuit, petitioner first argued that a showing of "cause and prejudice is not necessary" because the claims at issue were not procedurally barred. Petitioner then asserted that, should such a showing be necessary, she could show a fundamental miscarriage of justice would occur. However, the only "showing" that petitioner purported to make to the 'Ninth Circuit was to argue that she was "improperly convicted of two counts of first-degree murder' and that the "convictions were unsupported by the facts." (Opening Brief at 37-39).

attempted to make the requisite showing of actual innocence sufficient to meet the *Schlup* standard.

4. Petitioner's claims should be dismissed as procedurally barred

The California Supreme Court's denial of petitioner's claims raised herein as her Grounds 5-11 in the SAP and Sup. Grounds 1-4 was based on a procedural rule that was an adequate and independent state law ground at the time of petitioner's default. Because petitioner has made no showing that the failure to consider the procedurally defaulted claims will result in a fundamental miscarriage of justice of someone who is actually innocent of the crimes of which petitioner was convicted, the Court once again recommends that petitioner's Grounds 5-11 in the SAP and Supplemental Grounds 1-4 be dismissed as procedurally barred.

IV.

RECOMMENDATION

It is recommended that the District Court issue an Order: (1) adopting this Report and Recommendation; (2) dismissing petitioner's Grounds 5-11 in the SAP and Supplemental Grounds 1-4 as procedurally barred; and (3) directing that judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: May 1, 2012

/s/ Paul L. Abrams
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file Objections as provided in the Local Rules Governing Duties of Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

APPENDIX D

FILED
DEC 15 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONNA KAY LEE, Petitioner Appellant, v. DEBRA JACQUEZ, Acting Warden of Central California Women's Facility at Chowchilla, California – Substituted for Gwendolyn Mitchell, Respondent - Appellee.	)	No. 08-55919 D.C. No. 2:01-cv-10751-PA-PLA MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Argued and Submitted December 7, 2010
Pasadena, California

Before: TROTT and WARDLAW, Circuit Judges, and BREWSTER, Senior District Judge.###**

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Rudi M. Brewster, Senior United States District Judge for the Southern District of California, sitting by designation.

Donna Kay Lee appeals the District Court's denial of her petition for habeas corpus. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm in part, and reverse and remand in part.

The California Court of Appeal's conclusion that Lee's severance motion was properly denied by the trial court was not objectively unreasonable. A failure to sever does not rise to the level of a due process violation unless it creates a serious risk of "compromis[ing] a specific trial right of one of the defendants," or of "prevent[ing] the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States*, 506 U.S. 534, 539 (1993). Lee has not shown how the joint trial violated her due process rights: as the Court of Appeal reasoned, "both defendants blamed unknown assailants for the murders and they both claimed to have themselves been victims of those unknown assailants." Nor does Lee point to any specific trial rights that were violated as a result of the joint trial.

The California Court of Appeal's determination that the trial court's exclusion of battered women's syndrome evidence under California Evidence Code § 352 did not violate Lee's due process rights was not objectively unreasonable. The exclusion of critical evidence may violate a defendant's due process rights if it deprives the defendant of "a fair opportunity to defend against a state's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). However, as the Court clarified in *Montana v. Egelhoff*, 518 U.S. 37 (1996), this is a highly case-specific inquiry, and the exclusion of relevant evidence does not automatically rise to the level of a due process violation. *Id.* at 53. Although this evidence may have been relevant

to explain Lee's memory loss and thus bolster her credibility. Lee's expert witness was permitted to testify about how prior trauma could lead to the dissociation and memory loss that Lee suffered in the days immediately following the stabbing; general evidence of the sexual relationship between the co-defendants was admitted; trial counsel argued that Lee was a battered woman in opening and closing arguments; and the evidence of Lee's guilt was overwhelming. Therefore, the Court of Appeal did not act objectively unreasonably by concluding that Lee was not deprived of the opportunity to present a defense.

The district court concluded that Grounds 5-11 in the Second Amended Petition and Supplemental Grounds 1-4 were procedurally barred because the California State Supreme Court dismissed them under *In re Dixon*, 41 Cal. 2d 756 (1953). The district court relied on a report and recommendation that erroneously concluded that the Ninth Circuit had found the *Dixon* rule to be an independent and adequate state law ground. Nevertheless, the district court granted a certificate of appealability on that very question.

On appeal, Lee presented evidence challenging the independence and adequacy of *In re Dixon* at the time of Lee's procedural default. We remand this question to the district court to permit the Warden to submit evidence to the contrary, and for consideration by the district court in the first instance. *Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir. 2003). Each party shall bear its own costs.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Appendix E

FILED
Clerk, U.S. District Court
JUL 26 2007

CENTRAL DISTRICT OF CALIFORNIA
BY s/CH DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

DONNA KAY LEE, Petitioner, v. GWENDOLYN MITCHELL, Warden, Respondent,	)	No. CV 01-10751-PA (PLA) **ORDER ADOPTING MAGISTRATE JUDGE'S FINAL REPORT AND RECOMMEND-ATION**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the entire file de novo, including the magistrate judge's final report and recommendation, and the objections to the report and recommendation that have been filed herein. The Court agrees with the recommendations of the magistrate judge.

ACCORDINGLY, IT IS ORDERED;

1. The final report and recommendation is adopted

2. Judgment shall be entered consistent with this order

3. The clerk shall serve this order and the judgment on all counsel or parties of record.

DATED: July 24, 2007

s/ Percy Anderson
HONORABLE PERCY ANDERSON
UNITED STATES DISTRICT JUDGE

Appendix F

FILED
CLERK, U.S. DISTRICT COURT
JUL 26 2007
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

DONNA KAY LEE,	)	No. CV 01-10751-PA
	)	(PLA)
Petitioner,	)	FINAL REPORT AND
v	)	RECOMMENDATION
	)	OF UNITED STATES
GWENDOLYN MITCHELL, Warden,	)	MAGISTRATE JUDGE
	)	
	)	
Respondent.	)	
	)	

This Final Report and Recommendation is submitted to the Honorable Percy Anderson, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, the Magistrate Judge recommends that the Petition for Writ of Habeas Corpus be dismissed with prejudice.

I.

PROCEDURAL HISTORY

On March 23, 1998, a Los Angeles County Superior Court jury convicted petitioner of two counts of first degree murder. The jury also found true the allegations that petitioner personally used a knife in committing both murders, and found true the special circumstances of multiple murders, lying in wait, and murder for financial gain. Cal Penal Code §§ 122022(b), 190.2(a)(3), 190.2(a)(15), 190.2(a)(1). (See respondent's Motion to Dismiss ("Motion"), Ex. A). Petitioner was sentenced to life in state prison without the possibility of parole, plus an additional two years for her use of a knife. (See Motion, Ex. B).

On appeal to the California Court of Appeal, petitioner raised four contentions: (1) her right to present a defense was violated when the trial court excluded evidence of her sexual relationship with her co-defendant, along with expert testimony that she suffered from battered women's syndrome; (2) the trial court's refusal to sever petitioner's trial from her co-defendant's resulted in a joint trial with mutually-antagonistic defenses and excluded critical defense evidence; (3) the trial court erred in refusing to instruct the jury that provocation could reduce the degree of the murders; and (4) the lying-in-wait special circumstance allegation was unconstitutionally vague and over broad. On August 28, 2000, in an unpublished decision, the California Court of Appeal affirmed the conviction. (See Motion, Ex. C).

Petitioner filed a petition for review in the California Supreme Court, raising the same grounds she had raised to the Court of Appeal. (See Motion, Ex. D).

On December 13, 2000, the California Supreme Court denied review. (See Motion, Ex. E).

Petitioner filed her original habeas petition ("Petition") herein on December 13, 2001, raising fourteen claims. On February 15, 2002, respondent filed a Motion to Dismiss contending that the Petition must be dismissed as unexhausted. In response, on March 20, 2002, petitioner filed a First Amended Petition ("FAP"), raising only the four claims she had raised in the California Supreme Court on direct review. Respondent filed an Answer and Return to the FAP on July 5, 2002. Petitioner filed a Traverse thereto on September 3, 2002 ("Trav. to FAP").

On January 13, 2003, petitioner filed a "Motion to Stay the Procedures with Leave of the Court to Exhaust State Remedies." The Court initially denied petitioner's Motion to Stay but due to subsequent case law, the Court reconsidered its decision and, after petitioner renewed her request to stay the FAP, the Court granted the request on December 8, 2003. In the meantime, petitioner filed a petition for writ of habeas corpus in the Los Angeles County Superior Court on November 3, 2003. The petition was denied on December 2, 2003, in an opinion finding that petitioner had failed to explain or justify her delay in seeking habeas relief and citing the following cases: *In re Harris*, 5 Cal.4th 813, 829 (1993); *In re Dixon*, 41 Cal. 2d 756 (1953); *In re Clark*, 5 Cal. 4th 750, 779 {1993); *People v. Karis*, 46 Cal. 3d 612, 656 (1988); and *In re Terry*, 4 Cal. 3d 911, 926 (1971). (See Return to Second Amended Petition ("Return to SAP"), Ex. A). Petitioner then filed a petition for writ of habeas corpus in the California Court of Appeal on December 15, 2003. That petition was denied on January 8, 2004, as follows:

> Contentions raised and rejected on appeal may not be renewed in petitions for writ relief. (See *In re Terry* (1971) 4 Cal. 3d 911, 927; *In re Waltreus* (1965) 62 Cal. 2d 218, 225). Further, with regard to any issues not raised on appeal, petitioner has not stated facts sufficient to support relief (*In re Clark* (1993) 5 Cal. 4th 750, 763-787; *In re Swain* (1949) 34 Cal. 2d 300, 303-304) and has not submitted a record adequate for review (*Sherwood v. Superior Court* (1979) 24 Cal. 3d 183, 186-187).

(See Return to SAP, Ex. B).

On January 26, 2004, petitioner filed a petition for writ of habeas corpus in the California Supreme Court raising the following eleven claims: (1) petitioner's due process rights were violated because she was "never properly placed under arrest nor mirandized [sic]"; (2) petitioner's due process rights were violated by the exclusion of "all female jurors"; (3) petitioner's due process rights and right to an impartial jury were violated when a juror committed misconduct by stating "What . . . he killed his mother?"; (4) petitioner's due process rights were violated when the trial court excluded evidence relevant to petitioner's defense as too prejudicial to her co-defendant and because his "almost confession spilled over onto petitioner and denied petitioner a defense"; (5) petitioner's due process rights were violated because her initial trial counsel worked from the same office as that of her co-defendant; (6) petitioner's due process rights were violated when she was forced to testify in order to allow petitioner to present expert testimony; (7) petitioner's due process rights were violated when she was punished more harshly

after she rejected various plea offers and chose to proceed to trial; (8) the prosecutor committed misconduct by introducing evidence of aiding and abetting when petitioner was not charged as an aider and abettor; (9) petitioner was sexually assaulted by a sheriff's deputy in a holding cell during jury deliberation; (10) petitioner's rights to a fair trial and an impartial jury were violated when a juror "nodded off several times during trial"; and (11) petitioner's right to an impartial jury was violated when two jurors, on separate occasions, were questioned in a public restroom about which case they were sitting on. (See Return to SAP, Ex. C). The petition was denied on December 1, 2004, with the following statement: "Petition for writ of habeas corpus is DENIED. (See *In re Waltreus* (1965) 62 Cal. 2d 218; *In re Dixon* (1953) 41 Cal. 2d 756; *In re Seaton* (2004) 34 Cal.4th 193)." (See Return to SAP, Ex. D).

On January 3, 2005, petitioner filed a Motion to Amend herein along with a Second Amended Petition ("SAP"). In the SAP, petitioner raised the same four grounds she had raised in her FAP herein as Grounds 1 to 4 and, as her Grounds 5 to 11, the correspondingly-numbered claims she had raised in her habeas petition to the California Supreme Court. The Court granted petitioner's Motion to Amend. On June 6, 2005, respondent filed a Return to Second Amended Petition ("Return to SAP") accompanied by a supporting Memorandum of Points and Authorities ("Return to SAP, Mem."), contending, inter alia, that petitioner's formerly unexhausted claims are procedurally barred. (Return to SAP, Mem. at 3-6).

On September 8, 2005, petitioner filed a Traverse to Return to Second Amended Petition ("Trav. to Return to

SAP"). At the same time, petitioner filed a Motion to Stay Traverse to Return to Second Amended Petition in which she sought leave to supplement the SAP with four additional grounds ("Supplemental or Sup. Grounds"). The four Supplemental Grounds correspond to the first four claims she had raised in her habeas petition to the California Supreme Court. (See "Petitioner Makes this Request to Add Four Exhausted Grounds to her Second Amended Petition" ("Sup. to SAP")). Respondent filed an opposition thereto ("Oppo. to Motion to Stay") on October 12, 2005, contending that, while three of the proposed supplemental grounds are substantially similar to grounds raised in the Petition, petitioner's Supplemental Ground 2 had never been brought in a federal habeas petition and, consequently, was time-barred. (See Oppo. to Motion to Stay at 3A). Petitioner filed a response to respondent's opposition on November 2, 2005. On November 3, 2005, the Court granted petitioner's request to amend her SAP to add the four Supplemental Grounds, without prejudice to respondent asserting that Supplemental Ground 2 is time-barred.

On April 4, 2006, respondent filed a Supplemental Return to Second Amended Petition ("Sup. Return to SAP") accompanied by a supporting Memorandum of Points and Authorities, contending, inter alia, that petitioner's supplemental claims are procedurally defaulted and that her Supplemental Ground 2 is time-barred. Petitioner filed a Traverse thereto ("Trav. to Sup. Return") on June 16, 2006.

Thus, the matter is deemed submitted and is ready for a decision.

II.

STATEMENT OF FACTS

A. EVIDENCE PRESENTED BY THE PROSECUTION

Sonia Salinas worked at the Bank of America check processing center in downtown Los Angeles. (See Reporter's Transcript ("RT") at 4408-09, 4563-65). In 1991, she started dating a co-worker, Paul Carasi. (RT at 4410-11). When she became pregnant, she moved in with Carasi and his parents into their apartment. (RT at 4432-33, 4440-41, 4451-54). Carasi and his mother, Doris, were the managers of the apartment complex. (RT at 4468, 4599, 4920, 4926). Sonia and Paul's son, Michael, was born in January, 1993. (RT at 4411-12).

In June and July, 1993, Salinas was hospitalized for gallstone surgery and then for pancreatitis. (RT at 4412-14, 4457). She was hospitalized for six weeks the second time. (RT at 4444). During this time, Doris took care of Michael. (RT at 4414). Toward the end of Salinas' hospital stay, Carasi told a co-worker, "I wish that bitch would have died." (RT at 4663-68).

After coming out of the hospital, Salinas moved out of Carasi's residence and moved in with her mother. She took Michael with her. (RT at 4444, 4465-68). Following a child support hearing in November, 1994, Carasi agreed to pay Salinas $375 a month. (RT at 4972-73, 5577-79). In January, 1995, Salinas returned to court and was awarded custody. The court ordered Carasi's wages garnished for the $375 monthly payments. (RT at 4417-18, 4973-74, 5579).

Carasi was angry and referred to Salinas as a "bitch" and a "whore" for garnishing his wages. He said she was not leaving him any money for himself. (RT at 4643-44, 4657-58). He told a co-worker, "Fuck that bitch. She won't get away with taking my kid. I'll get her one day." (RT at 4663, 4668, 4670). He told a former supervisor that he was not worried about custody because Salinas "wasn't going to be around." (RT at 5325-28). When a co-worker told Carasi, "Sonia is getting half your stuff now," he replied, "Yeah, I wish she were dead." (RT at 4856-57).

Carasi became romantically involved with petitioner, another co-worker, toward the end of 1994. (RT at 4714-16, 5189, 5209, 5296-97, 5301). Petitioner was married at the time to a man who did not treat her well. (RT at 4903-04). She decided to divorce her husband and move in with Carasi. (RT at 4570, 4579-80).

In October, 1994, petitioner and Carasi applied to a finance company for a $10,000 bill consolidation loan for which they would be jointly liable. Six months later, the account balance was still a little over $10,000. They owed an overdue payment of $178 and a minimum required payment of $359. (RT at 5120-25, 5144-46, 5149-55).

On April 17, 1995, the Monday after Easter, Salinas told her supervisor, Martha Dominguez, that Doris had thrown Carasi and petitioner out of her apartment. (RT at 4563, 4565, 4571, 4584-85). Carasi and petitioner moved into another apartment in the same complex. (RT at 4919, 4921, 4923-24, 6387-88). On Easter Sunday, Carasi had taken Salinas on a drive and told her that he had been sleeping with petitioner. Salinas slapped him and was upset. When they returned to the apartment complex, Carasi began to shake and sweat, and fell to the ground.

He had to be helped up the stairs. Salinas got Doris to go over to check on him. Petitioner barred Doris' entry and pushed her. Doris grabbed petitioner's hair, struck her, and forced her way in. Carasi was taken to the hospital. (RT at 4586-89, 4611-12, 4769-74, 4801-03). Carasi told his supervisor, Lydia Moreno, that he was going to get a restraining order against his mother because of the fight between his mother and petitioner. (RT at 4769-71, 4774).

That same Monday, petitioner also spoke to Dominguez. Petitioner stated that he had had a terrible Easter Sunday and that Salinas found out about her sexual relationship with Carasi. Doris had demanded they return the furniture that she had lent them. Petitioner stated that she was having some financial problems and was filing for bankruptcy. She said Carasi and Doris were also having financial problems and would be seeking bankruptcy protection. (RT at 4571-73, 4611-12). Petitioner said that she was going to have to move out of Carasi's apartment. Carasi wanted to move back in with his mother. (RT at 4621-22).

During the week before the murders, possibly on Thursday, May 11, 1995, petitioner's supervisor Jimmy Leung overheard petitioner telling a co-worker that she was going to do "something stupid" and would be going to prison for it. Petitioner said that she would have a gun. Leung assumed petitioner's statements pertained to her divorce. (RT at 4731-33, 4735,4740, 4748-52).

On May 14, 1995, Mother's Day, petitioner and Carasi were still living together. (RT at 4611, 5298). Carasi took his mother Doris, Salinas, and Michael out to dinner at Country Star restaurant in Universal Studios' CityWalk. (RT at 5242-45, 5296, 5298, 5300). Petitioner

left the couple's residence a few hours after Carasi. (RT at 5298-99, 5322). At 9:49 p.m., a call was made from a pay phone at the Country Star Restaurant to Carasi's cell phone. The call was charged via Carasi's calling card to his home phone. (RT at 5253-54, 5396-5401, 5406-08, 5426-27, 6374, 6378-79, 6397-6400). Petitioner had Carasi's cell phone in her car that night. (RT at 9522, 9810). A hostess at Tony Roma's in CityWalk saw petitioner walking near Tony Roma's that night. The hostess saw petitioner walking toward the parking garage at several different times. (RT at 5353-55, 5362-65). A Universal Studios parking receipt later found in petitioner's car had been issued at 9:57 p.m. (RT at 5455 56, 7399-01, 9812-13). Carasi paid the bill at the Country Star restaurant at 10:43 p.m. and then his party left. (RT at 5242-43, 5253, 5291).

The car they had arrived in was parked on the fifth floor of the garage, next to a wall. (RT at 5790-91, 5860-61, 5887-88). There were no other cars parked in the immediate vicinity. (RT at 5606). After dinner, Doris and Sonia were stabbed to death in the CityWalk parking garage. (RT at 5590, 5609-15, 6189, 6965-66, 6985). Michael was still strapped into a car seat in the back of the car. He was unhurt. (RT at 5790-91, 6012-13, 6122). Carasi was covered in blood. (RT at 5637-38, 5657, 5722, 5787-88). He told a security guard that he, his girlfriend, his mother, and his son went to dinner at CityWalk. When they returned to their car, someone grabbed him from behind and pushed him against a railing. The assailant demanded money. When Carasi said that he did not have any, the assailant grabbed Carasi's fanny pack and pushed him to the ground. Wen Carasi got up, he saw his mother and his girlfriend lying in pools of blood. (RT at 5874-75, 5887-90). He could not give any description of the assailant nor could he explain why he was covered with

blood. (RT at 5887, 5890-91, 5903-04). He said that he did not touch the bodies. (RT at 5887, 5890).

Paramedics who examined Carasi could not determine the source of the blood covering his body. (RT at 5997, 6015-17, 6049). The paramedics found that Carasi was uninjured except for a small cut on his right thumb. Carasi said he had no idea how his thumb had been cut. (RT at 6017-19, 6128). He told paramedics that someone grabbed him from behind, sat on him, and held him down. He never looked up. (RT at 6029, 6032, 6092-93). Carasi actually had multiple cuts on both of his hands, including a cut to the edge of his palm. (RT at 7021-22). The coroner characterized the wound to Carasi's palm as consistent with a "knifer's wound," which typically occurs when a slippery knife hits a hard object, causing the hand to slide along the knife after the knife stops moving. (RT at 6958-59, 7018-23). Salinas had a stab wound to the sternum, and the coroner testified that striking this type of blow could have caused a knifer's wound. (RT at 7023-24).

Carasi's knife was found inside the garage. (RT at 5893-94, 5968-69). The condition of Carasi's car and the victims' wounds suggested that there had been more than one assailant. (RT at 8329, 8340-45, 8685). Blood on the inner portion of Salina's left shoe was found to contain petitioner's DNA. (RT at 8056-58, 8253-54, 8360-70). Based on the blood flow and the position of the shoe at the murder scene, a serologist concluded that petitioner must have bled into that shoe prior to Salina's final resting position at the scene of the crime. (RT at 8280-81, 8367-70.)

Meanwhile, about five miles away, petitioner called 911 from an emergency call box on the 170 Freeway North.

(RT at 6152-54, 6159-60, 6405, 6427-30). She reported that she had been robbed and stabbed. She told the 911 operator that she had pulled off the road because she felt sick. Someone then came along, took her purse, and stabbed her in the stomach. (RT at 9522, 9918-19). Responding police officers found her seriously injured, with a severe abdominal wound and one of her intestines protruding. (RT at 6167-70, 6204-06). She was later found to have stab wounds to her back and lower left leg as well. (RT at 7206-06, 7209). Petitioner was wearing a black T-shirt, a pair of jeans and some dark shoes. (RT at 6180, 6193-94). The car was locked and the keys were in the ignition. (RT at 6165).

Inside petitioner's car, police found Carasi's bloodstained cellular telephone and a ticket stub for the Universal CityWalk parking garage from that night. (RT at 5455-56, 6310, 6312-13, 6349-51, 6379, 7399-01, 9812.) Two plastic bags stained with blood were found under the driver's seat. (RT at 7397-99). A money pouch containing petitioner's identification and $24 in currency was found under the driver's seat. (RT at 7391, 7394-95, 7600, 7602). Nearby, down the freeway embankment, officers recovered a number of items, including a money pouch containing Doris' personal effects, items of clothing, woolen gloves, a washcloth, and a knife with a broken tip, all of which were bloodstained. (RT 6152-53, 6270-79, 6275-76, 7356-57). The blood on the money pouch was determined to contain petitioner's DNA. (RT at 7352, 7354-57, 7491-92, 8077). The blood on the woolen gloves contained petitioner's and Doris' DNA. (RT at 7370-71, 8958-60). One of the bloodstains on the knife contained Salinas' DNA. (RT at 7879-81, 8078). Blood on petitioner's jeans was consistent with Doris' DNA. (RT at 7512, 8084-85, 8370-71.)

Petitioner was taken to the hospital. Before undergoing surgery, she would not respond to police officers or medical staff about how she sustained her wounds, despite repeated questioning. (RT at 6434-36, 6441-42, 6460-61, 6662-63, 6670-71, 6699-01). Early the next morning, she told police officers that she knew that Carasi had gone to dinner with his mother the previous night. She had driven to Universal Studios and parked near there. She did not know how she was stabbed. She claimed that she did not know anything about the fanny packs that were found along the freeway beside her. (RT at 6470-71, 6473-75). That afternoon, petitioner was again questioned by police. (RT at 6485-88). After the detectives lied by saying some fingerprints had been found on the knife, petitioner told them that she had grabbed the knife and fought with the assailant. (RT at 6492, 6623-24, 9943-44).

Autopsies performed on Doris and Salinas showed that they had suffered extensive, mutilating knife wounds. Doris had extensive throat wounds, consistent with a sawing motion across the neck, and no defensive wounds. (RT at 6342, 6848, 6851, 6976-78, 7122-23). Salinas had been stabbed many times in the throat, face, hands, and torso. (RT at 6857-58, 6860, 6868, 6985). She had many defensive wounds on her hands, indicating that she had put up a vigorous fight. One of her wounds was consistent with her having held a knife which then slipped from her grasp. (RT at 6985, 7026, 7029-32). The coroner testified that the victims' wounds were consistent with having been caused during a rage killing. (RT at 6958-59, 7090, 7095-97).

Both petitioner and Carasi had scheduled a vacation from work for the week beginning May 15, 1995. (RT at 4575, 4740, 4755, 4958-59, 4974-75).

On May 18, 1995, as Carasi was being transferred to jail for booking, he asked police officers what he would get if he pleaded guilty. (RT at 6485-86, 6501-02). Carasi telephoned petitioner before he was booked and told her "Remember what we talked about." (RT at 6503-08). About a year later, fifteen letters between petitioner and Carasi were seized in their respective jail cells. (RT at 6816-19, 6827-28, 8090-91).

B. EVIDENCE PRESENTED BY PETITIONER

Petitioner testified in her own defense that she had gone to meet petitioner and his mother at CityWalk. (RT at 9555, 9802-04, 9811-12, 10038-39). The purpose of the meeting was to tell Doris that petitioner and Carasi were going to be together and that Salinas was going to have to let Michael see petitioner. (RT at 9907). Petitioner denied any involvement in the murders. (RT at 9965-67, 9979). She claimed that she never saw Carasi, Salinas, or Doris at CityWalk that night. (RT at 9822-23.)

About two weeks before Mother's Day, Carasi and petitioner got into an argument during which Carasi pushed her, hit her, and choked her. Petitioner pretended to pass out in order to get Carasi to stop. (RT at 9767-68, 9771-72). After the attack, petitioner knew their relationship was over. (RT at 9774-75). She stopped having sex with him. (RT at 9775, 10129). During the week of May 6, 1995, she wrote him a letter, breaking up with him. (RT at 9778-80, 10123-25, 10128). However, petitioner did not move out. (RT at 9775, 10128-29). She

was waiting for her vacation, which was scheduled to begin on May 15, 1995. (RT at 9776, 10040-42).

The reasons for the breakup included Carasi's odd sexual behavior, his emotional treatment of her, and his physical abuse. (RT at 10031-32). Early in the evening of May 14, 1995, Carasi invited her to come to Universal CityWalk to talk things over with Doris at an outdoor coffee shop, the Upstart Crow. (RT at 9802-04, 9807, 9811-12). She agreed because Carasi was still her friend, and she wanted Doris to be her friend again. (RT at 9868-70). On her way to CityWalk, petitioner got a call from Carasi on his cell phone, which happened to be in her car. He asked if she was going to come. Petitioner said she was on her way, hung up, and turned off the phone. (RT at 9810-11, 9819, 9961).

When she arrived, petitioner parked on the fifth floor of the garage because that was where she and Carasi always parked. (RT at 9813-16, 9871-73). She went downstairs to find the others. (RT at 9816). She walked back and forth a few times looking for them. (RT at 9916-17). She walked to Tony Roma's restaurant because she and Carasi had eaten there, but she could not find them. She considered paging Carasi, but she did not have a callback number and she did not know how to activate his cell phone. (RT at 9816-20). Petitioner decided to sit in her car and wait for them, but she fell asleep. (RT at 9820-21).

The next thing petitioner remembered was being grabbed by the arm as though someone were trying to pull her out of the car. She figured someone was trying to steal her car. She did not look to see who her assailant was because her stomach was already hurting. (RT at 9821-23,

9875-76, 9882). Petitioner remembered driving out of the parking garage and trying to get home. (RT at 9822, 9888). She saw that she was stabbed in the stomach. She pulled off the freeway and called 911 from an emergency call box. (RT at 9823-24). She did not know how she sustained the other wounds; she had no recollection of being stabbed in the back of the leg. (RT at 9892). She had no recollection of struggling with the assailant. (RT at 9893). Petitioner admitted that she falsely reported that she had been robbed and stabbed after she pulled off the freeway. (RT at 9919-20).

Petitioner did not know how her blood was found on Salinas' shoe, or how Doris' blood was on her jeans. (RT at 9969-71). She did not know how Doris' fanny pack, Salinas' purse, the knife, the bloody gloves, or the bloody towel wound up alongside the freeway embankment. (RT at 9981-83, 9986-89). She testified that she never saw Carasi, Salinas, or Doris at CityWalk that night, and she never got near Carasi's car. (RT at 9822-23). Petitioner denied any involvement in the murders. (RT at 9965-67, 9979).

On Wednesday, petitioner woke up in the hospital. (RT at 9826, 9926, 9959). She had no memory of various events that occurred between then and the time she was stabbed. (RT at 9826-27, 9923-24, 9926, 9931-34). According to forensic psychologist Vianne Castellano, memory loss can have psychological as well as pharmacological and organic causes. (RT at 10341-42, 10356-66). Psychological memory loss, also called psychogenic or dissociative amnesia, occurs either when an event is not encoded as memory, or it is encoded but cannot be retrieved. (RT at 10366, 10372, 10384, 10386). A traumatic psychological event, or a painful physical

event, can cause repressed memory or even no memory. (RT at 10390-91, 10399-402). According to Dr. Castellano, a sleeping person dragged out of a car and severely wounded in an attack might be unable to form a memory of that event, in full or in part. (RT at 10406-08). Memory closely related to an earlier psychological trauma would be particularly susceptible to being lost. (RT at 10412, 10420-21). In a dissociative state, a person experiences a sense of losing time and may compensate by confabulating, that is, filling in memory gaps with what she had been told or from picking up clues from the environment. (RT at 10422-24). This dissociative condition can last for minutes, hours, or days. (RT at 10425).

III.

PETITIONER'S CONTENTIONS

Ground 1: the exclusion of evidence of petitioner's sexual relationship with her co-defendant, as well as expert testimony that she was a bettered woman, violated her right to present a defense (SAP ¶ 10(a));

Ground 2: petitioner's rights to due process and a fair trial were violated when the trial court refused to sever petitioner's trial from that of her co-defendant (*id.* ¶ 10(b));

Ground 3: the trial court's refusal to instruct the jury that provocation could reduce the degree of murder was prejudicial error (*id.* ¶ 10));

Ground 4: California's lying-in-wait special circumstance statute is unconstitutionally vague and overbroad (*id.* 10(d));

Ground 5: petitioner's due process rights were violated because her initial trial counsel worked from the same office as that of her co-defendant (SAP at page 6a);

Ground 6: petitioner's due process rights were violated when she was forced to testify in order to allow petitioner to present expert testimony (*id.*);

Ground 7: petitioner's due process rights were violated when she was punished more harshly after she rejected various plea offers and chose to proceed to trial (*id.*);

Ground 8: the prosecutor committed misconduct by introducing evidence of aiding and abetting when petitioner was not charged as an aider and abettor (*id.*);

Ground 9: petitioner was sexually assaulted by a sheriff's deputy in a holding cell during jury deliberation (*id.*);

Ground 10: petitioner's rights to a fair trial and an impartial jury were violated when a juror "nodded off several times during trial" (*id.*);

Ground 11: petitioner's right to an impartial jury was violated when two jurors, on separate occasions, were questioned in a public restroom about which case they were sitting on (*id.*);

Sup. Ground 1: petitioner's due process rights were violated because she was "never properly placed under arrest nor mirandized [sic]" (Sup. to SAP at 3);

Sup. Ground 2: petitioner's due process rights were violated by the exclusion of "all female jurors" (*id.* at 4);

Sup. Ground 3: petitioner's due process rights and right to an impartial jury were violated when a juror committed misconduct by stating "What he killed his mother?" (*id.* at 5); and

Sup. Ground 4: petitioner's due process rights were violated when the trial court excluded evidence relevant to petitioner's defense as too prejudicial to her co-defendant and because his "almost confession spilled over onto petitioner and denied petitioner a defense" (*id.* at 6).

IV.

STANDARD OF REVIEW

The Petition was filed after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"). Pub. L. No. 104-132, 110 Stat. 1214 (1996). Therefore, the Court applies the AEDPA in reviewing the Petition. *See Lindh v. Murphy*, 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

Under the AEDPA, a federal court may not grant a writ of habeas corpus on behalf of a person in state custody "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). As explained by the Supreme Court, section 2254(d)(1) "places a new constraint on the power of a federal habeas court to grant

a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *Williams v. Taylor*, 529 U.S. 362, 4412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In *Williams*, the Court held that:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13; *see Weighall v. Middle*, 215 F.3d 1058, 1061-62 (9th Cir. 2000) (discussing *Williams*). A federal court making the "unreasonable application" inquiry asks "whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409; *Weighall*, 215 F.3d at 1062. The Court explained that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams*, 529 U.S. at 411; *accord*: *Lockyer v. Andrade*, 538 U.S. 63, 123 S.Ct. 1166, 1175, 155 L.Ed.2d 144 (2003). Section 2254(d)(1) imposes a "highly deferential standard for evaluating state-court rulings,"

Lindh, 521 U.S. at 333 n. 7, and "demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 123 S.Ct. 357, 360, 154 L.Ed.2d 279 (2002) (per curiam). A federal court may not "substitut[e] its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)." *Id.*; *Early v. Packer*, 537 U.S. 3, 123 S.Ct. 362, 366, 154 L.Ed.2d 263 (2002) (per curiam) (holding that habeas relief is not proper where state court decision was only "merely erroneous").

The only definitive source of clearly established federal law under the AEDPA is the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. *Williams*, 529 U.S. at 412. While circuit law may be "persuasive authority" for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law (*Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 1999)), only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied. *Williams*, 529 U.S. at 412; *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir.), *cert. denied*, 540 U.S. 968 (2003). Furthermore, under 28 U.S.C. § 2254(e)(1), factual determinations by a state court "shall be presumed to be correct" unless the petitioner rebuts the presumption "by clear and convincing evidence."

The United States Supreme Court has held that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding the judgment or rejecting the same claim rest upon the same ground." *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). Here, petitioner raised her Grounds 1 to 4 of the SAP in her direct appeal, which was denied with a reasoned decision.

(*See* Motion, Ex. C). Petitioner then filed a petition for review in the California Supreme Court raising the same claims, which was summarily denied. (*See* Motion, Exs. D. E). In accordance with *Ylst*, this Court looks through the California Supreme Court's unexplained order to the last reasoned state judgment, which is the Court of Appeal's Opinion. *See Ylst*, 501 U.S. at 803. It is that Opinion that this Court reviews under the AEDPA standards for petitioner's Grounds 1 to 4. Petitioner raised her Grounds 5 to 11 of the SAP and her Sup. Grounds 1 to 4 in her habeas petition to the California Supreme Court, which was summarily rejected. (*See* Return to SAP, Exs. C, D). Because there is no reasoned decision addressing Grounds 5 to 11 or Sup. Grounds 1 to 4, this Court must perform an independent review of the record to determine whether the state courts erred in their application of controlling federal law in rejecting these claims. *See Delgado v. Lewis*, 223 F.3d 976, 981 (9th Cir. 2000).

V.

DISCUSSION

A. PETITIONER'S FORMERLY UNEXHAUSTED CLAIMS ARE PROCEDURALLY BARRED

Respondent contends that all of petitioner's formerly unexhausted claims (Grounds 5-11 in the SAP and Sup. Grounds 1-4) are procedurally barred because the state courts denied these claims on procedural grounds. (Return to SAP, Mem. At 3-6; Sup. Return to SAP at 3). Respondent asserts that petitioner unreasonably waited to bring the claims to the state courts, and should have known of the claims at the time of her direct appeal because they were readily discoverable from the trial

record. Further, respondent contends that the California procedural rule barring petitioners from raising claims in habeas proceedings that could have been raised on appeal is clear and has been consistently applied. (*Id.* at 5-6.)[1]

In order for a claim to be procedurally defaulted for federal habeas corpus purposes, "the application of the state procedural rule must provide 'an adequate and independent state law basis' on which the state court can deny relief." *Park v. California*, 202 F.3d 1146, 1151 (9th Cir.), *cert. denied*, 531 U.S. 918 (2000), *quoting Coleman v. Thompson*, 501 U.S. 722, 729-30, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). "For a state procedural rule to be 'independent,' the state law basis for the decision must not be interwoven with federal law." *La Crosse v. Kernan*, 244 F.3d 702, 704 (9th Cir. 2001); *see Morales v. Calderon*, 85

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[1] Respondent also contends that petitioner's state court habeas petitions were consistently denied as being untimely and that "California's procedural rule barring untimely habeas petitions has been clear since at least 1993," with a citation to *Morales v. Calderon*, 85 F.3d 1387 (9th Cir. 1996). (Return to SAP, Mem. at 3, 6). The Court notes that the Ninth Circuit has held that California's timeliness rule is **not** an adequate procedural rule because it is ambiguous and has been inconsistently applied. *See King v. LaMarque*, 464 F.3d 963, 966-68 (9th Cir. 2006) (citing and discussing *Morales*). Although respondent thus has failed to adequately plead that California's untimeliness rule is an independent and adequate procedural bar pursuant to *Bennett v. Mueller*, 322 F.3d 573, 584-86 (9th Cir.), *cert. denied*, 540 U.S. 938 (2003), this failure is irrelevant because the last state court to render judgment on petitioner's habeas claims was the California Supreme Court, which did **not** cite California's untimeliness rule in rejecting petitioner's claims. *See Harris v. Reed*, 489 U.S. 255, 263, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) ("a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar").

F.3d 1387, 1393 (9th Cir. 1996). In order for a procedural bar to be adequate, state courts must employ a "firmly established and regularly followed state practice." *Ford v. Georgia*, 498 U.S. 411, 423-24, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991).

Here, plaintiff raised her Grounds 5-11 and her Sup. Grounds 1-4 in her habeas petition in the California Supreme Court. That petition was denied on December 1, 2004, with citations to *In re Waltreus*, 62 Cal.2d 218 (1965); *In re Dixon*, 41 Cal.2d 756 (1953); and *In re Seaton*, 34 Cal.4th 193 (2004). (*See* Return to SAP, Ex. D).

Under California's *Waltreus* rule, "the California Supreme Court will not review in a habeas petition any claim raised on direct appeal." *Hill v. Roe*, 321 F.3d 787, 789 (9th Cir. 2002). The *Waltreus* rule, however, does not bar federal habeas review because it is not a denial on procedural grounds. *Id.* (citing *Ylst*, 501 U.S. at 805); *see also Forrest v. Vasquez*, 75 F.3d 562, 564 (9th Cir. 1996); *Sanchez v. Ryan*, 392 F.Supp.2d 1136, 1138-39 (C.D. Cal. 2005). Similarly, California's *Dixon* rule "bars a habeas corpus petitioner from raising a claim that was not, but should have been, raised on appeal." *In re Seaton*, 34 Cal.4th 193, 199, 17 Cal.Rptr. 3d 633, 637, 95 P.3d 896, 900 (2004), *as modified*, 2004 Cal. LEXIS 9245, 2004 WL 2186674 (2004) (discussing the application of *Waltreus*, *Dixon*, and *In re Harris*, 5 Cal.4th 813, 21 Cal.Rptr. 2d 373, 855 P.2d 391 (1993) (also discussing *Waltreus* and *Dixon*), to habeas denials).

The Court concurs with respondent that petitioner's formerly unexhausted claims (her Grounds 5-11 and her Sup. Grounds 14) were readily apparent from the appellate record. Further, petitioner did not raise any of these

claims in her direct appeal. (*Compare* Motion, Ex. D, *with* Return to SAP, Ex. C). Therefore, these claims fall squarely within the scope of California's *Dixon* rule. *See Seaton*, 34 Cal.4th at 200 (explaining that, when the California Supreme Court "invoke[s] the *Dixon* bar," they "mean that the claim is based on the appellate record, and thus was fully cognizable on appeal"). Although a state court procedural default will not preclude federal habeas review if the state court order is ambiguous, here the three cases cited by the California Supreme Court in rejecting petitioner's habeas petition are not contradictory, and it is quite clear that the California Supreme Court's citation to *Dixon* is applicable to all of petitioner's claims raised therein. *See Koerner v. Grigas*, 328 F.3d 1039, 1050 (9th Cir. 2003) (a state court must specify which claims were barred for which reasons); *Lambright v. Stewart*, 241 F.3d 1201, 1206 (9th Cir. 2001) ("By invoking two contradictory arguments, the state court failed to make a clear finding of procedural default and federal review is to barred."), *cert. denied*, 534 U.S. 1118 (2002); *Morales*, 85 F.3d at 1392 ("a procedural default based on an ambiguous order that does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral review").

Moreover, the *Dixon* rule has been found by the Ninth Circuit to be an independent and adequate procedural ground when applied subsequent to the California Supreme Court's 1998 decision in *In re Robbins*, 18 Cal.4th 770, 77 Cal.Rptr. 2d 153, 959 P.2d 311 (1998). *See Flores v. Roe*, 2007 WL 1113336 at *1 (9th Cir. 2007) (now citable for its persuasive value pursuant to Ninth Circuit Rule 36-3); *Bennett*, 322 F.3d at 582-83; *see also Sanchez*, 392 F.Supp.2d at 1138 (finding respondent had

sufficiently pleaded the adequacy and independence of the *Dixon* rule to be adequate and independent post-*Robbins*). Here, petitioner should have raised her formerly unexhausted claims in her petition for review to the California Supreme Court, which was filed in 2000, which was subsequent to *Robbins*. The Court therefore finds that respondent has met its burden of pleading that the *Dixon* bar is an independent and adequate state procedural ground.

In response to respondent's defense, petitioner conclusorily asserts that she has "complied with all the courts[']rules to the best of her ability and feels she should not be denied relief because she is *pro per* and feels that she is entitled to federal habeas relief." (Trav. To Return to SAP at 3-4; Trav. To Sup. Return at 2). Petitioner's status as a *pro se* litigant, however, does not exempt her compliance with procedural rules. *See, e.g., Pliler v, Ford*, 542 U.S. 225, 231, 124 S.Ct. 2441, 159 L.Ed.2d 338 (2004) ("District judges have no obligation to act as counsel or paralegal to *pro se* litigants."); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) ("*Pro se* litigants must follow the same rules of procedure that govern other litigants."). The Ninth Circuit has held that "[o]nce the state pleads the affirmative defense of an independent and adequate state procedural bar, the burden to place that defense in issue shifts to the petitioner." *Bennett*, 322 F.3d at 584. Here, petitioner has not even purported to set forth any argument, let along raise any specific factual allegations, demonstrating the inadequacy of California's *Dixon* rule. *See Bennett*, 322 F.3d at 586 ("petitioner may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure"). Petitioner's *pro se* status cannot excuse her failure to carry

this burden. *See Flores*, 2007 WL 1113336 at *1 (finding that the petitioner's "*pro se* status" was "inapposite because he was not required to use a particular strategy to rebut the defense and he was not prevented from developing alternative means to challenge the bar"). Further, even if the adequacy of the *Dixon* rule had not been established, petitioner has failed to even raise a challenge to the adequacy of the rule. *See King*, 464 F.3d at 967 (holding that, if the Ninth Circuit has "found a state procedural rule to be inadequate, petitioners may fulfill their burden under *Bennett* by simply challenging the adequacy of the procedure"). Accordingly, the Court finds that petitioner has failed to meet her burden of placing the adequacy of the *Dixon* rule in issue.

Consequently, federal habeas review of petitioner's formerly unexhausted claims is barred, unless petitioner can demonstrate cause for her procedural default and actual prejudice as a result of the alleged violation(s) of federal law. *See Coleman*, 501 U.S. at 750; *Bennett*, 322 F.3d at 580; *Park*, 202 F.3d at 1150. To satisfy her burden of demonstrating "cause" for the procedural default, petitioner must show "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).

Here, petitioner has not even purported to assert that any objective factor prevented her from raising her claims in accordance with the State's procedural rule. The Court need not reach the issue of whether petitioner has satisfied her burden of demonstrating the requisite "prejudice" because petitioner must demonstrate *both* cause and prejudice. *See Murray*, 477 U.S. at 494; *Thomas v. Lewis*, 945 F.2d 1119, 1123 n. 10 (9th Cir. 1991)

The Supreme Court has recognized an exception to the requirement that petitioner demonstrate both "cause" and "prejudice," where petitioner can demonstrate that failure to consider the procedurally defaulted claims will result in a fundamental miscarriage of justice because she is actually innocent of the crimes of which she was convicted. *See, e.g., Coleman*, 501 U.S. at 750; *Murray*, 477 U.S. at 496; *Noltie v. Peterson*, 9 F.3d 802, 806 (9th Cir. 1993). In order to qualify for this "miscarriage of justice" exception, however, petitioner must "support his allegations of constitutional error with new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) (recognizing that such evidence "is obviously unavailable in the vast majority of cases"). Further, to establish the requisite probability that a constitutional violation probably has resulted in the conviction of one who is actually innocent, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." 513 U.S. at 327 Here, petitioner has not even purported to adduce the kind of new reliable evidence described in *Schlup*, nor has she purported to make the requisite showing of actual innocence sufficient to meet the *Schlup* standard.

The Court therefore finds that petitioner's Grounds 5-11 in the SAP and Sup. Grounds 1-4 are procedurally defaulted.

B. THE TRIAL COURT'S EXCLUSION OF EVIDENCE

In her Ground One, petitioner claims that the trial court erred when it excluded evidence of her sexual relationship with her co-defendant, Paul Carasi, and testimony from a defense expert that petitioner was a bettered woman. She claims that Carasi lured her as well as the other women to the parking structure and attacked them. Petitioner contends that the excluded evidence of Carasi's "deviant sexual relationship" with petitioner explained his motive to attack her. Further, she contends that the excluded testimony of her expert would have explained her relationship with Carasi and provided a "credible alternative explanation for her conduct before, during and after the crimes." (SAP ¶ 10(a); Trav. to FAP at 16-21). Petitioner claims that during trial, petitioner's trial counsel sought to prove that: "(1) Carasi had an obsession for bizarre, ritualistic sex practices; (2) petitioner was such a severely battered woman that she agreed to engage in such practices as long as Carasi did not abuse her; (3) Carasi eventually assaulted her, causing her to break off their relationship; and (4) when she decided to leave him, 'she became the prime candidate for his anger." (Trav. to FAP at 16, *citing* RT at 4305, 10100-01).

In rejecting this claim in petitioner's direct appeal, the California Court of Appeal found that "[t]he contested issue at trial was whether [petitioner] had taken part in killing the victims, not why she was involved." (Motion, Ex. C at 32). Hence, the evidence of battered women's syndrome ("BWS") would have exculpated petitioner only if she had admitted taking part in the killings. Since petitioner testified that she had nothing to do with the murders, the trial court "properly excluded the BWS evidence." (*Id.*) The Court of Appeal found that general evidence of petitioner's sexual relationship with Carasi had been admitted and that it was "unclear what would have

been accomplished by admitting further steamy details regarding rubber suits and cellophane wrapping." (Motion, Ex. C at 34-35.)

The record reflects that, prior to opening statement, petitioner's trial counsel sought to introduce Carasi's diary entries from 1989 (six years prior to the murders), demonstrating Carasi's sexual fantasies involving rubber suits and being wrapped in cellophane. (RT at 4306-07). The trial court excluded this evidence during opening statement. (RT at 4308). Petitioner's trial counsel also sought to introduce evidence that petitioner was a battered woman, to explain her conduct in writing love letters to Carasi and in staying with him after his assault on her. (RT at 4350-51). The trial court excluded evidence pertaining to BWS during opening statement. (RT at 4353-54).

During trial, petitioner's trial counsel sought to introduce detailed evidence of Carasi's sexual practices. (RT at 9587-97, 9658). The trial court limited the evidence to general questions regarding whether petitioner thought they had normal heterosexual sex, without the need for specific details. (RT at 9592, 9596, 9661).

During petitioner's testimony, petitioner's trial counsel again sought to introduce evidence that petitioner was a battered woman. (RT at 9442, 9456-57). Petitioner's offer of proof was that BWS explained why petitioner met Carasi on the night of the murders, and why she stayed with him following the murders. (RT at 9446-48). The trial court found that the evidence was not relevant. (RT at 9445-46). The trial court ruled that "[i]f the theory of [petitioner's defense] is 'I had nothing to do with the killings of those two women,' what you're talking about is

not relevant." (RT at 9458). Petitioner's trial counsel once again sought to introduce evidence of BWS to rebut evidence that petitioner was in control of the relationship, and to rebut evidence suggesting that her memory loss was selective. (RT at 10166-68). The trial court excluded the evidence of BWS under California Evidence Code § 352. (RT at 10175). Finally, petitioner's counsel sought to introduce evidence of BWS during the testimony of the expert psychologist. (RT at 10249-84). The trial court excluded the evidence once again as not relevant. (RT at 10263, 10270, 10278). The trial court, however, did allow expert testimony regarding petitioner's memory loss in the days immediately following her stabbing. (RT at 10262-63, 10288.)

The Sixth Amendment requires that a defendant have a "fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 1731, 164 L.Ed.2d 503 (2006) (*quoting Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)). A defendant's right to present a defense may be violated by the erroneous exclusion of critical, corroborative defense evidence. *See Chambers*, 410 U.S. at 295-302; *DePetris v. Kuykendall*, 239 F.3d 1057, 1062 (9th Cir. 2001) ("The Supreme Court has made clear that the erroneous exclusion of critical, corroborative defense evidence may violate both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense."). There is, however, no constitutional right to present irrelevant evidence. *See Wood v. Alaska*, 957 F.2d 1544, 1549-50 (9th

Cir. 1992). Nor does a defendant have an unfettered right to offer relevant evidence that is incompetent, privileged or otherwise inadmissible under standard rules of evidence. *See Montana v. Egelhoff*, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996). Further, judges are permitted "to exclude evidence that is repetitive . ., only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues." *Holmes*, 126 S.Ct. at 1732 (internal quotation marks omitted, alterations in original); *see Crane*, 476 U.S. at 689-90.

To grant federal habeas relief based on a state court's decision to exclude evidence, the decision "must be so prejudicial as to jeopardize the defendant's due process rights." *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990). Under *Tinsley*, a federal court must balance five factors to determine whether the exclusion of evidence in the state trial court violated a petitioner's due process or Sixth Amendment rights: (1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense. *See Tinsley*, 895 F.2d at 530. Analysis of the *Tinsley* factors indicates that the state court's decision rejecting this claim was not contrary to clearly established Supreme Court law.

Here, the trial court properly excluded detailed evidence regarding petitioner's sexual practices with Carasi as irrelevant. The diary entries had little probative value since they were written four years before Carasi met petitioner. In addition, the court admitted general evidence of Carasi's sexual relationship with petitioner. Petitioner testified that the relationship was "too weird,"

"too kinky," and that "[i]t wasn't me." (RT at 9658). Thus, further details of their sexual relationship would not have added much probative value to the evidence already admitted.

Evidence of BWS was also properly excluded because it was not relevant. As stated in *People v. Erickson*, 57 Cal.App.4th 1391, 1399, 67 Cal.Rptr.2d 740 (Cal. App. 5 Dist. 1997):

> Battered women's syndrome evidence is generally relevant in murder cases in one of two different ways. First, it may be relevant to establish self-defense, i.e., that the defendant actually and reasonably believed in the need to defend against imminent death or serious bodily injury. (Citation omitted). Second, battered women's syndrome evidence may be relevant to establish "imperfect self-defense," i.e., that the defendant actually believed in the need to defend against imminent death or serious bodily injury, but the belief was objectively unreasonable. (Citations omitted). In both versions of self-defense, battered women's syndrome evidence may be relevant to establish "defendant's actual, subjective perception that she was in danger and that she had to kill her husband to avoid that danger." (Citation omitted). Syndrome testimony also may be relevant on the issue of the defendant's credibility.

(Citations omitted).

Here, petitioner never claimed that she killed the victims in self-defense. To the contrary, petitioner's defense was that she was awakened in her car by an unknown assailant, who stabbed her. She claimed that she never saw Carasi or the victims that night, and she denied any involvement in the killings. In excluding this evidence, the trial court stated that evidence of BWS would have been relevant and admissible "if this was a case that in any way from the defendant's point of view smacked of, gee, I may have done this because I was under the thumb and influence of Mr. Carasi and I just couldn't resist him." However, "if the theory of [petitioner] is [she] had nothing to do with the killings of those two women, then what you're talking about is not relevant." (RT at 9458, 10270). Here, neither petitioner's alleged status as a battered woman nor her sexual relationship with Carasi had any relevance to the defense offered at trial.

Moreover, even assuming the trial court erred in excluding the evidence, the exclusion did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *see also Bains v. Cambra*, 204 F.3d 964, 976-77 (9th Cir.), *cert. denied*, 531 U.S. 1057 (2000). First, portions of the evidence petitioner sought to introduce were admitted. The jury heard some of the details of petitioner's sexual relationship with Carasi. (RT at 9586-87, 9656-59). Second, petitioner's trial counsel argued that petitioner was a battered woman. During opening statement, petitioner's trial counsel characterized her as "a victim of physical, sexual, and psychological abuse throughout her entire life." (RT at 4332). During closing argument, petitioner's trial counsel mentioned threatening phone calls from petitioner's husband, as well as petitioner's

statement in a letter to Carasi that she "should be used to being used by the men in my life" and "all the abuse that I have lived with." (RT at 11066, 11068, 11088, 11090). Petitioner's trial counsel described her fight with petitioner's mother as "not the first time that [she] had been the victim of violence in a domestic relationship." (RT at 11126-27).

Finally, the evidence of petitioner's guilt was overwhelming. Petitioner was overheard saying she was going to do "something stupid" that weekend for which she would go to prison. Petitioner and Carasi agreed to meet that night at Universal CityWalk, she was seen walking around in CityWalk, and a parking receipt for the parking garage at CityWalk was found in the car she was driving. Petitioner's DNA was found on Salinas' shoe at the murder scene and on Doris' money pouch that was found near the car petitioner was driving. Doris' DNA was found on petitioner's jeans. Petitioner had knife wounds to her back and lower leg. Doris' money pouch, woolen gloves with petitioner's DNA, and a knife with a broken tip were found on the freeway embankment near the car petitioner was driving. Both petitioner and Carasi had arranged to take vacations starting the day after the murders. Petitioner was unable to explain away this evidence. Thus, the exclusion of evidence of Carasi's sexual behavior and battered women's syndrome could not have had a "substantial and injurious effect on the verdict."

Accordingly, the Court finds that petitioner has failed to show that the California courts' rejection of this claim was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, or was based on an unreasonable determination of the facts.

C. TRIAL COURT'S REFUSAL TO SEVER PETITIONER'S TRIAL FROM CARASI'S

In her Ground Two, petitioner claims the trial court violated her constitutional rights to due process and a fair trial when it refused to sever her trial from Carasi's. She argues that her defense depended upon: (1) portraying Carasi as a sexual deviant whose mother had molested him, which gave him a motive to kill his mother; and (2) portraying herself as a severely battered woman who became Carasi's "third victim" after he assaulted her and she ended their sexual relationship. She contends that the denial of a severance prevented her from presenting critical defense evidence. (SAP at ¶ 10(b); Trav. to FAP at 21-25).

1. The Record Below

On October 29, 1996, petitioner filed a motion to sever her trial from Carasi's trial. The motion was based upon the fact that two jailhouse informants had submitted statements made by Carasi, in which Carasi stated that petitioner and he had planned the killings. Carasi told one of the informants at first that petitioner had slit Salinas' throat and wounded herself with the knife alongside the freeway. In a subsequent conversation with the same inmate, Carasi said that he, and not petitioner, had killed Salinas and that petitioner's wounds were the result of defending herself from Salinas. Carasi told another inmate that he killed both Doris Carasi and Salinas and that petitioner's wounds were self-inflicted. Carasi never told

this inmate that the killings were planned and he made inconsistent statements about whether petitioner was to meet him at CityWalk at Universal Studios; however, he said that petitioner brought the knife in her purse which was used to kill the victims.[2] *See* "Motion To Sever," lodged with the Court on January 7, 2003.

Prior to this motion being adjudicated, on or about July 22, 1997, petitioner filed a "Supplemental Motion To Sever," which included a declaration from petitioner's counsel and a supporting memorandum.[3] (*See* CT 884-97). The trial court denied the motion to sever on August 5, 1997, finding that the motion to sever failed to set forth any "mutually antagonistic" defense justifying severance. (*See* RT 675, 730).

On February 23, 1998, petitioner filed a "Motion For Mistrial/Supplemental Motion To Sever." The motion argued that conflicting defenses which had emerged during the trial justified severing the trials. Petitioner alleged that the testimony of the coroner, Dr. Carpenter, and the toolmark expert, Mr. Dowell, could be interpreted as

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[2] As neither Carasi nor the jailhouse informants testified at the trial, the jury never heard these alleged statements by Carasi.

[3] Most of the supporting declaration of petitioner's trial counsel (*see* Clerk's Transcript ("CT") 886-92) was filed under seal at trial and does not appear in the Trial Transcript. Respondent avers that the Court of Appeal has been unable to locate these pages in its record on appeal. *See* "Notice Of Second Supplemental Lodging Of Documents," filed January 7, 2003 at 2. Although trial counsel's declaration is missing, the Court is able to fully address this claim based upon petitioner's pleadings, which allege specific instances of prejudice resulting from the trial court's denials of petitioner's motions to sever, including specific citations to the Clerk's Transcript and the Reporter's Transcript, which are included in the record before the Court. (*See* Trav. To FAP at 21-25.)

concluding that either one or more knives were used to attack the victims. However, while petitioner's defense was based on the "one knife" theory – *i.e.*, that petitioner, as well as the victims, were stabbed by Carasi – Carasi's defense was based on the theory that the victims were assaulted and robbed and that two knives (at least) were used. Thus, petitioner argued, petitioner's and Carasi's arguments about how many knives were used in the attack were in direct conflict.

Petitioner also argued that testimony that there might be tire tracks in the blood might support Carasi's theory that the victims were attacked and robbed but would undermine petitioner's theory that she was attacked by Carasi. Testimony as to how many possible assailants there were was also subject to the same conflicting theories about the evidence. Finally, petitioner argued that Carasi and petitioner had conflicting interpretations of bloodstains and blood spatter evidence. (CT 4742-45; *see* Trav. to FAP at 23). The trial court denied the renewed motion to sever.[4] (RT 8968-70.)

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[4] At an earlier motion by the prosecutor to be allowed to admit photographs of the murder scene, the prosecution outlined its theory that petitioner had been stabbed by Salinas in the course of assisting Carasi in killing Salinas, which would explain the fact that petitioner's blood was found on Salinas. The prosecutor believed that either one knife had been used in the killing or, if a second knife was used, it was of the same type as the knife used to kill Salinas and Doris Carasi, since the evidence indicated that the wounds to Doris Carasi, Salinas and petitioner were done by a similar blade. Petitioner's counsel objected to the photographs of Salinas being admitted, noting that the allegation of robbery had been made by Carasi and not petitioner and that, "[n]ow we have these gory photographs of Ms. Salinas being admitted, in large part based on statements made by Mr. Carasi that were not made or adopted by

Petitioner argues that, as a result of the failure to sever, the jury was presented with conflicting defenses and versions of events by Carasi and petitioner. Thus, petitioner notes that, while Carasi's defense was based on a theory that the victims were robbed, petitioner's counsel conceded in closing argument that no robbery had occurred. (RT 10981). As further evidence of prejudice, petitioner relies on the fact that the prosecutor, in closing, remarked on the two different reasons offered by petitioner and Carasi's counsel for why petitioner and Carasi were supposed to meet the day of the murder at Universal Studios, stating:

> [Carasi]'s counsel argued to you, "My client is going to meet [petitioner] there that night to tell Sonia and Doris they're going to be staying together and they're going to be taking custody of Michael." That was the reason for the set-up of the meeting. ¶ [Petitioner's counsel] says that they were going there to break up. That's why they are going there. ¶ You have two attorneys, diametrically opposed positions as to why there was this alleged meeting. Both fly in the face of the known reality, the evidence.

[petitioner], and she's being prejudiced by it. And I'm gong to renew my motion to sever." (RT 4029; *see* RT 4015-28). The court overruled the objection to the admission of the photographs of Salinas without directly addressing petitioner's renewed motion to sever, holding that the photographs supported the People's theory that petitioner and Carasi both had animus toward the victims, and the nature of Salinas' wounds rebutted Carasi's claim of a random robbery. (RT 4028-30).

(RT 11294). Petitioner also contends that the trial court's refusal to sever the cases resulted in the court excluding allegedly exculpatory evidence. (Trav. to FAP at 24-25.)

During the trial, petitioner's trial counsel sought to admit statements made by Carasi to Detective McWilliams to show that Carasi had a motive to kill his mother and that Carasi was going to break off the affair with petitioner and return to Salinas, thereby undercutting the prosecution's theory that Carasi and petitioner continued to have a romantic relationship up to the time of the murders. (RT 9276-78). Petitioner's trial counsel noted in arguing for the admission of these statements that the trial court had stated that, "the defense of [petitioner] and the defense of Mr. Carasi are not proceeding in tandem," and argued that petitioner's defense "is as much an adverse party to Mr. Carasi as the People." (RT 9279-80). Carasi's trial counsel and the prosecution sought to exclude the statements, primarily on grounds of hearsay. (RT 9282-84, 9288-89). The trial court refused to admit the statements, holding that they were neither relevant nor declarations against penal interest. The trial court also noted that "no inconsistent defense has been offered at this point." (RT 9291). Later in the trial, petitioner's counsel asked petitioner about whether Carasi had described his feelings for his mother in this letters to her. (RT 9845). After the court interrupted and called a sidebar, petitioner's trial counsel argued that Carasi's feelings for his mother were relevant to establish that Carasi alone had a motive to kill his mother "that does not apply to my client," and that petitioner's counsel was "attempting to disprove . . that the motive for these killings was a selfish desire on the part of these two people to be together literally over the dead bodies of Sonia Salinas and Doris Carasi." (RT 9846, 9848). Carasi's counsel objected to the admission of

Carasi's statements, although the prosecutor had not objected to their admission. (RT 9848). After an in camera hearing, the court excluded any questions about the content of the letter in which Carasi allegedly talked about his feelings for his mother. (RT 9858).

Petitioner's counsel also sought to introduce into evidence two letters, or diary entries, written by Carasi in 1989, that reflected Carasi's fantasies and sexual desires. Petitioner's counsel explained that the evidence was relevant to show that Carasi had long harbored specific sexual fantasies which he hoped to be able to fulfill some day with a woman, that he had been able to realize these fantasies with petitioner, and that when she broke off the relationship he attacked her. (RT 10633-39). The trial court noted that it had already indicated that it did not view the trial as "centered on what specific acts occurred between Mr. Carasi and [petitioner]." (RT 10635). The trial court excluded the diary entries, stating that "I think it's sole purpose would be to prejudice Mr. Carasi in the eyes of the jurors." (RT 10639). The trial court also observed that the jury would be "unable to abide by my admonition not to allow their reaction to Carasi's [lifestyle] to prejudice them against [him]." (RT 10641). Petitioner's renewed motion for a mistrial and for severance was again denied. (RT 10641-42). Similarly, petitioner cites as an example of prejudice from the failure to sever the trials, the court's comment to the jury that, "As I see the issues presented to you, that [*i.e.*, the nature of sexual activities between petitioner and Carasi] is a completely side issue that as to what kind of sexual orientation somebody may have had in and of itself is not something that should influence your decision on the issues that are relevant to the guilt or innocence of the defendants in this trial." (RT 10110-13).

The California Court of Appeal, in rejecting this claim on direct appeal, fond that the trial court did not abuse its discretion in refusing to sever the trials because Carasi's and petitioner's defenses were not mutually antagonistic, since both claimed that they were the victims of unknown assailants. Further, it found that, while petitioner's counsel may have hinted at Carasi as the murderer by denying that there had been a robbery, petitioner never expressly accused Carasi of having attacked her. (Motion, Ex. C at 29-30).

2. Application of Federal Law

A trial court's denial of severance may prejudice a defendant sufficiently to render his trial fundamentally unfair in violation of due process. *See Grisby v. Blodgett*, 130 F.3d 365, 370 (9th Cir 1997). Petitioner must demonstrate that the state court's denial of his severance motion resulted in prejudice great enough to render his trial fundamentally unfair, by showing that the failure to sever had a substantial and injurious effect or influence in determining the jury's verdict. *See id.*; *Sandoval v. Calderon*, 241 F.3d 765, 772 (9th Cir. 2001). The Supreme Court has declined, however, to adopt a bright-line rule that severance is required "whenever codefendants have conflicting defenses." *Zafiro v. United States*, 506 U.S. 534, 538-39, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993). Rather, the Supreme Court concluded that a "court should grant a severance . only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. . . [A] defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial." *Id.* at 538-39.

Petitioner argues that the evidence of Carasi's motive to kill his mother and his sexual fantasies was exculpatory and was excluded only because petitioner and Carasi were tried together. The record, however, reflects that not only would this evidence not have been relevant or admissible even if petitioner had been tried *alone* for the murders (*i.e.*, it would not have tended to show that petitioner did not participate in the killings or rebut any of the prosecution's evidence against petitioner), but the evidence was not exculpatory for petitioner in her joint trial. First, petitioner's defense had nothing to do with her relationship with Carasi. Rather, petitioner testified that she was attacked in her car in the garage at Universal Studios and never saw Carasi or the victims that night. Second, even without petitioner's testimony regarding the events of the evening, the excluded evidence of Carasi's motive to kill his mother and his alleged potential motive to stab petitioner did not refute any of the forensic evidence against petitioner, did not provide an explanation for why evidence from the murders was found near the car she was driving, and did not explain her conflicting statements to the police.

Nor were the defenses of Carasi and petitioner so antagonistic as to require a severance. *See Zafiro*, 506 U.S. at 538 ("antagonistic defenses are not prejudicial per se, even if defendants are hostile to or seek to blame one another" (internal quotation marks omitted)). Carasi's defense was that the murders were the result of a robbery by unknown assailants. His consequent interest in proving that more than one knife was used in the killings, and that evidence indicated the presence of multiple assailants, did not increase the likelihood of a guilty verdict against petitioner. In fact, had the jury believed Carasi's robbery theory, it likely would have found petitioner not guilty.

Further, petitioner's defense, if believed, did not require the jury to find Carasi guilty. Petitioner testified that she never saw Carasi or the victims the night of the attack. Petitioner's trial counsel in his closing argument did attempt to distance petitioner's defense from Carasi's robbery theory by telling the jury that "[t]his is not a robbery committed by an unknown gang of thugs who robbed Mr. Carasi and tried to carjack [petitioner's] car" (RT 10981), and by stating that he agreed with the prosecution that there was no evidence of tire tracks or foot prints (RT 11035). Trial counsel, however, reinforced petitioner's defense theory by arguing that there was no evidence that petitioner was present when Salinas and Doris were murdered (RT 11033-35), that the presence of petitioner's blood on Salinas' shoe was due to errors in performing the DNA analysis on the blood sample (RT 10985-11003), and that the DNA evidence was belied by the fact that there was no blood trail or blood stains at the scene that contained petitioner's blood (RT 10982-83, 11033-34). Petitioner's trial counsel argued that petitioner was attacked as she waited in her car in the parking garage at Universal Studios and that she had no recall of the attack. (RT 11079, 11093-94). Consistent with the defense theory that petitioner was not present during the killings, trial counsel argued that the expert from the Coroner's office and the coroner had concluded that all of the wounds appeared to have been inflicted by a knife with the same characteristics, which cast doubt on the prosecutor's theory that petitioner could have stabbed Salinas. (RT 11059-61). Trial counsel also argued that the prosecution's theory that Salinas managed to get the knife away from petitioner and stab her in the abdomen was undercut by the lack of defensive wounds on petitioner's hands. (RT 11101-03). Finally, trial counsel argued that petitioner

lacked a motive for a "rage killing" against the victims. (RT 11123-27). Accordingly, there was nothing in either petitioner's testimony or her closing argument supporting a "theory of the defense" that Carasi was the sole killer, or that petitioner was stabbed by Carasi. Therefor, given the fact that the excluded evidence was not "critical" exculpatory evidence and that the prosecution's case against petitioner was overwhelming, the trial court's denial of petitioner's motions to sever did not have a substantial and injurious effect or influence in determining the jury's verdict. *Sandoval*, 241 F.3d at 772.

Accordingly, the Court finds that petitioner has failed to show that the California courts' rejection of this claim was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, or was based on an unreasonable determination of the facts.

D. THE TRIAL COURT'S OMISSION OF A JURY INSTRUCTION ON PROVOCATION

In her Ground Three, petitioner claims that the trial court's refusal to instruct the jury that provocation could reduce the degree of the murder was prejudicial error. (SAP at ¶ 10(c); Trav. to FAP at 25-26). Petitioner claims that facts demonstrating Carasi's motive to kill both victims also demonstrated provocation leading up to the killings. She points to Carasi's acrimonious relationship with Salinas regarding custody of their son, petitioner's strained relationship with Doris as evidenced by the Easter Sunday altercation between them, and the coroner's description of the murders as "rage killings" as evidence of provocation. (Trav. to FAP at 25-26).

The record reflects that, during trial, both petitioner's trial counsel and Carasi's counsel requested instructions on voluntary manslaughter on the theory of provocation. (RT at 10689). The trial court refused the request, concluding that there was "no evidence in this case of adequate provocation." (RT at 10693-94). Trial counsel for both defendants later requested an instruction pursuant to CALJIC No. 8.73,[5] which states that provocation may be considered to reduce the degree of the murders. (RT at 10783-84). The trial court again refused the instruction. (RT at 10784).

The California Court of Appeal, in rejecting this claim on petitioner's direct appeal, held that the trial court properly refused to give an instruction on provocation "because it was not supported by any substantial evidence and because it was inconsistent with [petitioner's] testimony and her theory of the case – that she had nothing to do with the attack on the two murder victims." (Motion, Ex. C at 37).

The failure to give an instruction on a lesser included offense violates due process only in capital cases. *Beck v. Alabama*, 447 U.S. 625, 638, n. 14, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) ("We need not and do not decide whether the Due Process Clause would require the giving of such instructions in a noncapital case"); *Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir. 2000) ("[T]he failure of a state

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[5] CALJIC No. 8.73 states: "If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation." CALJIC No. 8.73 (West 2002).

court to instruct on a lesser offense [in a non-capital case] fails to present a federal constitutional question and will not be considered in a federal habeas proceeding.); *cert. denied*, 534 U.S. 839 (2001) quoting *James v. Reese*, 546 F.2d 325, 327 (9th Cir. 1976)); *Windham v. Merkle*, 163 F.3d 1092, 1106 (9th Cir. 1998) ("Under the law of this circuit, the failure of a state court to instruct on lesser included offenses in a noncapital case does not present a federal constitutional question.").

The Ninth Circuit, however, has noted that "the refusal by a court to instruct a jury on lesser included offenses, when those offenses are consistent with the defendant's theory of the case, may constitute a cognizable habeas claim." *Solis*, 219 F.3d at 929. In determining whether the refusal to instruct on the defense's theory of the case violates due process, "[w]e ask whether, under the instructions as a whole and given the evidence in the case, the failure to give the requested instruction rendered the trial so fundamentally unfair as to violate federal due process." *Duckett v. Godinez*, 67 F.3d 734, 746 (9th Cir. 1995), *citing Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); *see also Henderson v. Kibbe*, 431 U.S. 145, 155, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977) (holding that when the alleged error is the failure to give an instruction, the burden on the petitioner is "especially heavy").

Under California law, a lesser offense is "necessarily included" in a greater offense "if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." *People v. Birks*, 19 Cal.4th 108, 117-18, 77 Cal.Rptr.2d. 848, 960

P.2d 1073 (1998) (citations omitted). Here, as found by the California Court of Appeal in petitioner's direct appeal, CALJIC No. 8.73 does not instruct on a lesser included offense. Rather, it is what California courts consider a "pinpoint" instruction that "relates particular facts to an element of the charged crime and thereby explains or highlights a defense theory." (Motion, Ex. C at 36). As such, under California law, it was only required in cases where the evidence supports the defense theory. *See People v. Saille*, 54 Cal.3d 1103, 1119-20, 2 Cal.Rptr.2d 364, 820 P.2d 588 (1991); *People v. Lee,* 28 Cal.App.4th 1724, 1734, 34 Cal.Rptr.2d 723 (Cal.App. 4 Dist. 1994).

Here, the record reflects that the evidence did not support petitioner's theory that the murders were provoked. Petitioner's defense theory was that she had nothing to do with the murders. As such, there was no evidence to support a theory that petitioner was provoked into killing the victims. The court therefore concurs with the finding of the California Court of Appeal that there was no evidence to support the requested instruction on provocation. Consequently, the failure to give such an instruction cannot have rendered the trial so fundamentally unfair as to violate federal due process.

Moreover, any error by the trial court in refusing the requested instruction did not have a substantial or injurious influence in deterring the jury's verdict. *See Brecht*, 507 U.S. at 637 The trial court instructed the jurors at length concerning first and second degree murder, and their obligation to acquit petitioner of the first degree murder if they had any reasonable doubt as to the degree of either murder. (RT at 10822-28). Numerous DNA samples confirmed that petitioner was present at the scene of the murder; she was spotted at the crime scene

just before the murders; and Doris' and Salinas' belongings were found near petitioner and were stained with petitioner's DNA. In addition, the evidence belies any suggestion of a suddenly-provoked killing. A few days before the murders, petitioner told a co-worker that she would be going to prison for dong "something stupid." (RT at 4731-33, 4735, 4752). She agreed to meet Carasi at Universal CityWalk at the time of the murders, and she was carrying plastic bags in her car for which she had no explanation. Thus, the evidence in the record utterly belies any defense of provocation.

Accordingly, the Court finds that petitioner has failed to show that the California courts' rejection of this claim was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, or was based on an unreasonable determination of the facts.

E. THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE ALLEGATION

In petitioner's Ground Four, she claims that California's lying-in-wait special circumstance statute is unconstitutionally vague and overbroad and violates her right to due process.[6] She claims that there is little distinction between lying in wait as a form of first degree murder and lying in wait as a special circumstance, for which the defendant can be eligible for the death penalty. She claims that the statute fails to provide a meaningful

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[6] California Penal Code § 190.2(a) prescribes a penalty of death or life imprisonment without the possibility of parole if certain enumerated special circumstances are found to be true, one of which is if "[t]he defendant intentionally killed the victim while lying in wait." Cal. Penal Code § 190.2(a)(15).

basis for distinguishing the cases in which the greater penalty is imposed from the cases in which it is not. (SAP at ¶ 10(d); Trav. to FAP at 25-29).

The California Court of Appeal, in rejecting this claim on petitioner's direct appeal, found that petitioner lacked standing to raise any Eighth Amendment issues and that the lying-in-wait special circumstance statute is not vague and overbroad. (Motion, Ex. C at 37-40).

The Eighth Amendment requires that state sentencing guidelines clearly distinguish between criminals sentenced to death and those not sentenced to death. *See Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). The United States Supreme Court, however, has never held that the Eighth Amendment requires a distinction between criminal defendants sentenced to life imprisonment **without** parole and those defendants sentence to life imprisonment **with** parole. *See Houston v. Roe*, 177 F.3d 901, 906 (9th Cir. 1999). Accordingly, California's lying-in-wait special circumstance statute cannot violate the Eighth Amendment by imposing different sentences in non-capital cases. *See Houston*, 177 F.3d at 906. Moreover, because there is no Supreme Court case holding that the failure of a state to clearly distinguish between life imprisonment without parole and life imprisonment with parole can violate the United States Constitution, the California courts' rejection of petitioner's claim that the lying-in-wait special circumstance statute was unconstitutional cannot be said to be contrary to or involve an unreasonable application of clearly established federal law. *See Cary v. Musladin*, 127 S.Ct. 649, 654, 166 L.Ed.2d 482 (2006) ("Given the lack of holdings from this Court regarding" the claim, "it cannot be said that the state court

'unreasonabl[y] appli[ed] clearly established Federal law.'" (alterations in original)); *Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir.) ("If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law."), *cert. denied*, 543 U.S. 1037 (2004).

In addition, to the extent that petitioner argues that the lying-in-wait special circumstance statute violates the Eighth Amendment by establishing vague and overbroad guidelines for determining when the death penalty may be imposed, petitioner lacks standing to raise such a claim because she was not sentenced to death. *See Houston*, 177 F.3d at 906-07 (defendant "lack[ed] standing" to argue that the line between non-capital first degree murder by means of lying in wait and capital first degree murder with the special circumstance of lying in wait had become blurred as to make the imposition of the death penalty vague and arbitrary because he was not sentenced to death).

Finally, the Ninth Circuit has already rejected the claim that California's lying-in-wait special circumstance statue was unconstitutionally vague in *Houston*.

> In this case, the California legislature and courts have created a thin but meaningfully distinguishable line between the first degree murder lying in wait and special circumstances lying in wait. First degree murder is statutorily defined as "murder which is perpetrated by means of . . lying in wait." Cal. Penal Code § 189. Special

> circumstance murder is statutorily defined as murder where the "defendant intentionally killed the victim while lying in wait." Cal. Penal Code § 190.2(a)(15). . Because there is a distinction between first degree murder by means of lying in wait and capital murder with the special circumstances of lying in wait, California Penal Code § 190.2(a)(15) does not encourage arbitrary enforcement, and is not unconstitutionally vague.

Houston, 177 F.3d at 907-08 (citations and footnote omitted).

Accordingly, the Court finds that petitioner has failed to show that the California courts' rejection of this claim was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, or was based on an unreasonable determination of the facts.

VI.

RECOMMENDATION

It is recommended that the District Court issue an Order: (1) adopting this Report and Recommendation; and (2) directing that judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: July 23, 2007

s/ Paul L. Abrams

PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file Objections as provided in the Local Rules Governing Duties of Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

APPENDIX G

S122395

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re DONNA KAY LEE on Habeas Corpus

Petition for writ of habeas corpus is DENIED. (See *In re Waltreus* (1965) 62 Cal.2d 218; *In re Dixon* (1953) 41 Cal.2d 756; *In re Seaton* (2004) 34 Cal.4th 193.)

Filed: December 1, 2004

GEORGE
Chief Justice

Appendix H

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re DONNA KAY LEE, on Habeas Corpus.	B171838 (Los Angeles County Super. Ct. No. SA021795) ORDER

BY THE COURT:

The petition for a writ of habeas corpus, filed December 15, 2003, has been read and considered together with the appellate opinion in *People v. Lee*, case No. B126544 [nonpub. opn].

Contentions raised and rejected on appeal may not be renewed in petitions for writ relief. (See *In re Terry* (1971) 4 Cal.3d 911, 927; *In re Waltreus* (1965) 62 Cal.2d 218, 225.) Further, with regard to any issues not raised on appeal, petitioner has not stated facts sufficient to support relief (*In re Clark* (1993) 5 Cal.4th 750, 763-787; *In re Swain* (1949) 34 Cal.2d 300, 303-304) and has not submitted a record adequate for review (*Sherwood v. Superior Court* (1979) 24 Cal.3d 183, 186-187).

The petition is denied.

COURT OF APPEAL – SECOND DIST.

FILED

JAN 8 – 2004

JOSEPH A. LANE Clerk

V. GRAY

Deputy Clerk

APPENDIX I

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In re DONNA KAY LEE, on Habeas Corpus	Case No. SA 021795 **ORDER RE: WRIT OF HABEAS CORPUS**

The Court has read and considered the Petition for writ of habeas corpus filed on November 3, 2003. The petition is denied.

Absent strong justification, issues that could be raised on appeal must initially be so presented, and not on habeas corpus in the first instance. *In re Harris*, 5 Cal. 4th 813, 829 (1993), citing *In re Dixon*, 41 Cal. 2d 756 (1953).

The petition fails to demonstrate that these claims could not have been asserted earlier or that these claims could not have been presented concurrently with her appeal. *In re Clark*, 5 Cal. 4th 750, 779 (1993).

Petitioner fails to explain or justify her delay in seeking habeas corpus relief for the claims currently asserted.

Petitioner does not allege that the factual and/or legal bases for her claims were unknown at the time the earlier appeal was filed nor does she state when she became aware of the legal and factual bases for her claims.

The petition contains only vague, conclusory allegations. Conclusory allegations made without any explanation do not warrant relief. *People v. Karis*, 46 Cal. 3d 612, 656 (1988).

Petitioner's claim of ineffective assistance of counsel was available on direct appeal and should have been raised at that time.

A writ of habeas corpus is not available to attack a final judgment on the ground of illegal search and seizure. *In re Terry*, 4 Cal. 3d 911, 926.

Date: December 2, 2003

s/Stephanie Sautner
STEPHANIE SAUTNER
Judge of the Superior Court

APPENDIX J

Court of Appeal, Second Appellate District,
Division Three – No. B126544
S091820

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

DONNA KAY LEE, Defendant and Appellant.

Petition for review DENIED.

Mosk, J., is of the opinion the petition should be granted.

SUPREME COURT

FILED

DEC 13 2000

Frederick K. Ohrlich, Clerk
Deputy

GEORGE
Chief Justice

Appendix K

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DONNA KAY LEE, Defendant and Appellant.	B126544 (Super. Ct. No. SA021795)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie W. Light, Judge. Affirmed.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, and Robert M. Snider, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant, Donna Kay Lee, appeals from the judgment entered following her conviction, by jury trial, for two counts of first degree murder, with special circumstance findings based on murder-for financial gain, multiple murders and lying in wait, and with personal use of a deadly weapon findings (Pen. Code, §§ 187, 190.2, subds. (a)(l), (a)(3), (a)(15), 12022, subd. (b)(1)).[1] Sentenced to a state prison term of life without possibility of parole plus two years, Lee claims there was trial error.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

Sonia Salinas worked at the Bank of America check processing center in downtown Los Angeles. In 1991, she began dating a co-worker, Paul Carasi. When Salinas got pregnant, she moved into Carasi's parents' apartment in North Hollywood. Carasi's mother, Doris, was the manager of the apartment complex. The couple's son, Michael, was born in January 1993.

In June 1993, Salinas had gallstone surgery and then developed pancreatitis, which necessitated a further six-week hospitalization. During this time, Doris took care of Michael. Doris was also taking care of her husband, who died of cancer about a year later. Towards the end of

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[1] All further statutory references are to the Penal Code unless otherwise specified.

Salinas's hospital stay, Carasi said to a co-worker, "I wish that bitch would have died." He complained to another co-worker, Martha Dominguez, that because Salinas was embarrassed about her surgical scars, she didn't want to have sex with him. Carasi also thought Salinas's family was trying to persuade her to move back in with them and to prevent him from seeing Michael. Carasi angrily told Dominguez that if Salinas went along with this, he would kill her father.

Salinas did take Michael and move in with her parents. She did not return to work until late in 1994. When she did, she avoided answering her telephone because Carasi had been calling and she wanted nothing to do with him. Following a child support hearing in November 1994, Carasi agreed to pay Salinas $375 a month. Lacking a formal agreement about custody, however, they often argued about visitation scheduling. In January 1995, Salinas returned to court and was awarded primary custody. The court also ordered Carasi's wages garnished for the $375 monthly payments.

To a co-worker, Carasi angrily referred to Salinas as a "bitch" and a "whore" for garnishing his wages. He said she wasn't leaving him any money for himself. He told another co-worker, "Fuck that bitch. She won't get away with taking my kid. I'll get her one day." Carasi told a former supervisor that he wasn't worried about custody because Salinas wasn't going to be around. When a co-worker told Carasi, "Sonia is getting half your stuff now," he replied, "Yeah, I wish she were dead."

Defendant Lee also worked at the Bank of America, on the same floor as Carasi and Salinas. Carasi trained Lee, and during the summer of 1994 they started riding to work together. Towards the end of 1994, they became

romantically involved. At some point, Lee moved in with Carasi and Doris.

In October 1994, Lee and Carasi jointly applied to a finance company for a $10,000 bill consolidation loan for which they would be equally liable. Six months later, they still owed the loan amount, plus an overdue payment of $178 and a minimum required payment of $359. In February 1995, Lee told her supervisor, Martha Dominguez, that she and Carasi were living together and that she was getting a divorce. She said the divorce, her financial situation, and problems with Carasi were causing her a great deal of stress.

On April 17, 1995, the Monday after Easter, Salinas told Dominguez, who was her supervisor too, that Doris had thrown Carasi and Lee out of her apartment. Lee and Carasi moved to another apartment in the same complex. Doris subsequently had to be hospitalized for heart problems and Salinas took care of her when she was released from the hospital. Carasi invited Salinas to go for a drive on Easter Sunday. When he told her he had been sleeping with Lee, Salinas slapped him and demanded to be taken back to the apartment complex. When they returned, Carasi began to shake and sweat, and fell to the ground. He had to be helped up the stairs. Salinas got Doris to go over to check on him. When Lee barred Doris's entry and pushed her, Doris grabbed Lee's hair, struck her, and forced her way in. Carasi was taken to the hospital.

That same Monday, Lee also talked to Dominguez. Because of her pending divorce, Lee said she had financial problems and was filing for bankruptcy. She said Carasi and Doris were also having problems and would be seeking bankruptcy protection. After Salinas learned that Lee and Carasi were involved, Doris demanded they return the

furniture she had lent them. Lee said she was going to have to move because Carasi wanted to move back in with his mother. Relating the Easter events to another co-worker, Lee said she and Doris had had a fight in the hallway of the apartment complex. Carasi suffered seizures during the incident and had to be rushed to a doctor. Lee said she and Carasi would have to move out of Doris's apartment complex.

Meanwhile, Carasi had been receiving phone calls at work from creditors. In late April or early May 1995, he told a co-worker the calls would be increasing because his child support obligations were preventing him from paying his bills. Carasi said he would be "fucked for the next seven years" after having to file for bankruptcy. In April and May 1995, Carasi's checking .and savings accounts each had less then $275. His gross monthly salary was $1,886. His credit card accounts were either closed or overdrawn; he owed $3,000 on a car loan and more than $15,000 to various credit card companies.

On or about May 11, 1995, Lee's supervisor, Jimmy Leung, overheard her telling a co-worker that she was going to do "something stupid" or "something drastic" for which she could go to prison. Lee said she would have a gun. She said: "If I go to prison for it, I don't care."

On May 14, 1995 — Mother's Day — Lee and Carasi were still living together. Carasi was planning to take Salinas, Doris, and Michael out to dinner at Universal Studios CityWalk. Lee left the apartment a few hours after Carasi. At 9:49 p.m., a call was made from a pay phone at the Country Star Restaurant to Carasi's cell phone. The call was charged via Carasi's calling card to his home phone. Lee had Carasi' s cell phone in her car that night. A hostess at Tony Roma's CityWalk restaurant saw

Lee standing outside the restaurant. Later, the hostess saw Lee walking quickly toward the parking garage. A Universal Studios parking receipt later found in Lee's car had been issued at 9:57 p.m. Carasi paid the bill at the Country Star Restaurant at 10:43 p.m.

Shortly after 11:00 p.m., someone came into the Hollywood Athletic Club at CityWalk and said there was a fight going on around the comer. Club employees went upstairs to the parking garage. They found Carasi lying on his stomach at the top of the stairwell, covered in blood. There was blood on his clothing, hands, face and hair. Carasi pointed up toward the next flight of stairs, and said, "My kid is up there."

Carasi's car was parked on the fifth floor of the garage, next to a wall. There were. no other cars parked in the immediate vicinity. Michael, who was strapped into a car seat in the back of the car, was screaming "mommy, mommy." Salinas and Doris were found dead on the ground next to the car.

Security and police officers were summoned. Carasi told a security guard that after the group had gotten into the car, he realized he didn't have all his keys. He was going back to the restaurant when he was grabbed from behind and pushed against a railing. The assailant demanded money. When Carasi said he didn't have any, the assailant grabbed Carasi's fanny pack and pushed him to the ground. He heard screaming, and when he got up he saw Salinas and Doris lying in a pool of blood. He was too afraid to touch their bodies. He walked to the fourth floor to get help. He could not give any description of the assailant nor could he explain why he was covered with blood.

Paramedics arrived. Salinas and Doris had had their throats cut. Michael was uninjured. After examining Carasi, the paramedics could not determine the source of the blood covering his body. He was uninjured except for a small cut on his right thumb. Carasi said he had no idea how his thumb had gotten cut. Carasi told a paramedic he had been grabbed from behind and held down. He never looked up, and he couldn't describe the attacker.

Sometime around 11:00 p.m. that night, Lee called 911 from an emergency call box on the Hollywood Freeway, reporting that she had been stabbed. The call box was located about five miles from Universal Studios CityWalk. Lee told the 911 operator she had pulled off the road because she felt sick, and that someone had then come along, tried to take her purse, and stabbed her. A highway patrol officer found Lee on the ground next to her car, lying on top of a neatly arranged jacket. She was bleeding from a severe abdominal wound, and she had cuts on her back and on the back of one leg. Although her shirt was soaked in blood, there was no blood on her hands or on the freeway call box. The car was locked and the keys were in the ignition. There was a cell phone on the center console. On the freeway embankment below Lee's car, police found fanny packs belonging to Carasi and Doris, Salinas's purse, a bloody knife, blood-stained woolen gloves, a blood-stained latex glove, a bloody sweater, and a bloody washcloth.

Lee was taken to the hospital. Before undergoing surgery, she would not respond to a police officer who asked about her injuries. While answering other questions asked by the medical staff, she would not respond to questions about how she had sustained her wounds. The next day, Lee was again questioned by police. She told them she had gone to Universal Studios CityWalk to meet

Carasi. She had parked, but she fell asleep while waiting for him. Suddenly she was pulled out of her car and stabbed by an unknown assailant. After the detectives lied by saying some fingerprints had been found on the knife, Lee told them she had grabbed the knife and fought with the assailant. Asked if she had parked next to Carasi, she responded affirmatively. Asked who brought the knife out, she said she didn't know. Asked if it had been Carasi, she said, "I don't think so." Asked if she was there when the other two victims had been stabbed, she replied: "I don't -- I'm not sure. I don't know."

The autopsies performed on Doris and Salinas showed they both had suffered extensive, mutilating knife wounds. Doris had extensive throat wounds, consistent with a sawing motion across the neck, and no defensive wounds. Salinas had been stabbed many times in the throat, face, hands, and torso. She had defensive wounds, indicating that she had put up a vigorous fight, and one of her wounds was consistent with her having held a knife which then slipped from her grasp. The coroner testified the victims' wounds were consistent with having been caused during a rage killing. Detective McWilliams, called as a defense witness, concurred with the coroner's opinion. McWilliams testified that in her opinion, the wounds were inconsistent with a robbery, because a robbery victim is usually disabled quickly by a single wound, and because female victims rarely fight back during a robbery.

The coroner characterized the wound to Carasi's thumb as a classic "knifer's wound," which typically occurs when a slippery knife hits a hard object, causing the hand to slide along the knife after the knife stops moving. Salinas had suffered a stab wound to the sternum, and the coroner testified that striking this type of blow could have caused a knifer's wound.

A tool mark analyst examined the knife wounds suffered by Doris and Salinas, as well as the tears in Lee's clothing. All the wounds and the tears in Lee's clothing were consistent with having been inflicted by the same knife. A Thomas Guide was found in Lee's car; the page showing the location of Universal Studios CityWalk was dog-eared. Carasi's cell phone was in Lee's car; it was operating. Lee's fanny pack, containing $24, was found under the driver's seat in her car.

A Universal Studios parking receipt found in Carasi's car had been issued at 8:51 p.m. The parking lot manager testified there were two parking structures closer to the Country Star Restaurant than the one Carasi had parked in and that they were less expensive because they offered validated parking. The manager also testified that in the garage Carasi used there were parking spaces available on the second, third, and fourth levels when Carasi entered the garage and parked on the fifth level.

Carasi and Lee had each scheduled a vacation from work beginning the day after Mother's Day.

Serology and DNA evidence was presented. A bloody handprint on Carasi's shirt was consistent with Salinas's blood. Elizabeth Devine, a serologist, testified that in her opinion the handprint had been made during the attack, before Salinas sustained many of the cuts on her hand which would have prevented the definition of a handprint. The genetic profile from this blood occurs in only one in 5.8 million people. In Devine's opinion, the blood spatter on Carasi's shirt had been caused by at least 15 separate events, and was consistent with a swinging motion of the right arm. Human tissue consistent with Doris's body was found on Carasi's shirt.

The genetic profile. of a blood stain found on Salinas's shoe occurs in only one in 7.7 million people, and it was consistent with Lee' blood. The genetic profile of blood taken from the knee of Lee's jeans occurs in only one in 90,900 people and was consistent with Doris's blood. The knife found near Lee's car had blood on it that could have come from Carasi, Lee and Salinas. Blood on one of the gloves found near Lee's car was consistent with Doris's blood. Blood on another glove and a washcloth found near her car was consistent with Lee's own blood.

2. *Defense evidence.*

Lee testified in her own defense. Her theory was that she must have been the third victim of the attack that killed Doris and Salinas. She claimed she had ended her relationship with Carasi before the night of the murders.

Lee had been married to Frank Lee for about 15 years when she got involved with Carasi. She began staying with Carasi on weekends even before separating from her husband because she felt safer with Carasi. In February 1995, her husband kicked her out of the house when he discovered the affair, so Lee moved in with Doris and Carasi. Doris was extremely attached to the baby, who stayed with Salinas in Whittier during the week, and with Carasi and Doris on weekends. Because Doris was afraid of being cut off from Michael once Salinas discovered Carasi 's relationship with Lee, she stopped talking to Lee and eventually told her to move out of the apartment.

In April 1995, Carasi and Lee moved into another apartment in the same complex. Doris was still unhappy. She took back all the furnishings she had lent them, and she wouldn't let Michael visit Carasi at the new apartment. In the meantime, Salinas and Michael began to stay at Doris's apartment on weekends. This made Carasi mad

because his visits with Michael took place at Doris's apartment. Carasi told Lee he was going to move back into Doris's apartment to prevent Salinas from moving in there. After her fight with Doris on Easter Sunday, Lee began looking for another place to live. She found an apartment in Burbank, and she hoped Carasi would move in with her.

About two weeks before Mother's Day, Carasi and Lee got into an argument during which Carasi pushed her, hit her, and choked her. Lee pretended to pass out in order to get Carasi to stop. After the attack, Lee knew their relationship was over. She stopped having sex with him. During the week of May 6, 1995, she wrote him a letter, breaking up with him. This was the letter found in Carasi' s fanny pack after the killings. However, Lee did not move out because she was waiting for her vacation which was scheduled to begin on May 15, 1995.

On Thursday, May 11, 1995, Lee's daughter Sonja told her that her father had kicked her out of the house. Lee decided Sonja would live with her, even though a court order issued in conjunction with Lee's divorce prohibited any contact between Carasi and her daughters. Over the weekend Sonja slept in Lee's bed. Carasi was upset about Sonja's stay. On Friday, May 12, 1995, Lee had the conversation at work overheard by Jimmy Leung. Lee testified she had said that she didn't care if she were arrested and went to jail for violating the court order relating to her daughters. She denied having said she was "going to do something desperate" and that if she "had to go to prison for it, then so be it"; she never used the word "prison."

Lee spent Sunday, May 14, 1995, with two of her daughters. She paid little attention to Carasi, who was in and out of the apartment all day. In Lee's view their

relationship was over, although part of her wanted Carasi to stay. The reasons for the breakup included Carasi's odd sexual behavior, his emotional treatment of her, and his physical abuse. Early in the evening, Carasi invited her to come to Universal Studio CityWalk to talk things over with Doris at an outdoor cafe, the Upstart Crow. She agreed because Carasi was still her friend, and she still wanted Doris's friendship. She falsely told Sonja she was going shopping because she didn't want Sonja to come with her. En route to CityWalk, Lee got a call from Carasi on his cell phone, which happened to be in her car. He asked if she was going to come. Lee said she was on her way, hung up, and turned off the phone. She was not bothered that Salinas would be there too.

When she arrived, Lee parked on the fifth floor of the garage because that's where she and Carasi always parked. She went downstairs to find the others. She walked back and forth a few times looking for them. She walked to Tony Roma's restaurant because she and Carasi had eaten there, but she couldn't find them. She considered paging Carasi, but she didn't have a callback number and she didn't know how to activate his cell phone. Lee decided to sit in her car and wait for them, but she fell asleep.

The next thing Lee remembered was being grabbed by the arm as though someone were trying to pull her out of the car. She figured someone was trying to steal her car. She didn't look to see who her assailant was because her stomach was already hurting. She didn't know how she sustained the other wounds; she had no recollection of being stabbed in the back or the leg. She had no recollection of struggling with the assailant. She remembered driving out of the parking garage and trying to get home. She saw she was bleeding from the stomach.

It didn't occur to her to stop and ask for help. She pulled off the freeway in great pain. She walked to a call box and spoke to an emergency operator. She admitted falsely reporting that she had been stabbed after she pulled off the freeway, but she denied having used the bloody washcloth. She didn't know how the knife got there or [how] her sweater, the bloody gloves, or the bloody towel wound up alongside the freeway. She could not explain the wounds on her back and leg. She never saw Carasi, Salinas, or Doris at CityWalk that night, and she never got near Carasi's car.

On Wednesday, May 19, 1995, Lee woke up in the hospital. She had no memory of various events that had occurred between then and the time she was stabbed. According to forensic psychologist Vianne Castellano, memory loss can have psychological as well as pharmacological and organic causes. Psychological memory loss, also called psychogenic or dissociative amnesia, occurs either when an event is not encoded as memory, or when it is encoded but cannot be retrieved. A traumatic psychological event, or a painful physical event, can cause repressed memory or even no memory. According to Dr. Castellano, a sleeping person dragged out of a car and wounded in an attack might be unable to form a memory of that event, in full or in part. Memory closely related to an earlier psychological trauma would be particularly susceptible to being lost. In a dissociative state, a person loses time and may confabulate -that is, fill in memory gaps with what she has been told or has inferred. This dissociative condition can last for minutes, hours, or days.

3. *The trial.*

Lee and Carasi were tried together. Carasi did not testify. Both defendants were convicted of special circumstances murder. Carasi was sentenced to death; Lee was sentenced to life without the possibility of parole.

CONTENTIONS

1. Did the trial court err by denying Lee's motion to have her case severed from Carasi's case?

2. Did the trial court err by excluding evidence that Lee was suffering from battered women's syndrome?

3. Did the trial court err by excluding certain evidence about Carasi?

4. Did the trial court err by refusing to instruct the jury on provocation that would reduce the murder to second degree?

5. Is the lying in wait special circumstance constitutionally defective?

DISCUSSION

1. *Severance motion properly denied.*

Lee contends the trial court erred by refusing to sever her trial from Carasi' s trial on the ground they had mutually antagonistic defenses . . . This claim is meritless.

A trial court's denial of a motion to sever is reviewed for abuse of discretion. (*Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1285.) Severance is not required, or even justified, merely because two codefendants will present conflicting or antagonistic defenses. "'Rather, to

obtain severance on the grounds of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.' [Citations.] Stated another way, '"mutual antagonism" only exists where the acceptance of one party's defense will preclude the acquittal of the other.'" (*People v. Hardy* (1992) 2 Cal.4th 86, 168.)

Lee cannot meet this test because the two defense theories were not necessarily inconsistent; both defendants blamed unknown assailants for the murders and they both claimed to have themselves been victims of those unknown assailants. Indeed, these defenses were arguably mutually reinforcing, not mutually inconsistent. Even under the federal cases relied on by Lee, it is clear that she and Carasi did not have necessarily antagonistic defenses. "Mutually exclusive defenses are said to exist when acquittal of one codefendant would necessarily call for the conviction of the other. [Citation.] 'The prototypical example is a trial in which each of two defendants claims innocence, seeking to prove instead that the other committed the crime.'" (*U.S. v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1081.) Athough mutual accusations are not always required, "[f]or a proclamation of innocence to constitute an accusation, the facts of the dispute must be closed in a fashion that does not suggest the intervention of some unknown actor." (*Ibid.*)

The facts here were not 'closed' in the sense used by Tootick[2] because both defenses were predicated on the

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[2] In Tootick, "the principle defense of each defendant was that the other alone committed the assaults. Frank swore that he drove to an isolated spot at the side of a hill. Tootick, to his surprise, stepped out with Hart and stabbed him. [¶] Tootick's lawyer claimed

theory the murders had been carried out by unknown assailants. While Lee's attorney argued to the jury there had not been any robbery, Lee herself had said she thought her assailant was trying to steal her car. So while Lee's defense may have hinted that Carasi was the killer, she never expressly accused him of having attacked her. Even if she had, severance would have been justified only if there had been mutual inconsistency, and Carasi — like Lee — could not identify his attacker.

At bottom, the defenses were not necessarily irreconcilable, and therefore the trial court did not abuse its discretion by refusing to sever.

2. *BWS evidence properly excluded.*

Lee contends the trial court erred by excluding evidence seeking to establish that she was suffering from battered women's syndrome (BWS). This claim is meritless.

We recently discussed BWS in *People v. Gomez* (1999) 72 Cal.App.4th 405: "Evidence Code section 1107 provides in relevant part: '(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence,

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that his client was highly intoxicated and was either passed out or was asleep during the entire episode." (*U.S. v. Tootick, supra*, 952 F.2d at p. 1081.) A similar finding of necessarily inconsistent defenses was made in *Zafiro v. United States* (1993) 506 U.S. 534, where Zafiro testified that when she let Martinez store a suitcase in her closet she didn't know it contained drugs, and, although Martinez did not testify, his attorney argued Martinez had had no idea that his girlfriend Zafiro was involved in drug trafficking. (*Zafiro v. United States, supra*, 506 U.S. at p. 536.)

except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge. [¶] (b) The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness. Expert opinion testimony on battered women's syndrome shall not be considered a new scientific technique whose reliability is unproven.' (Italics added.) [¶] Whether expert testimony regarding battered women's syndrome is admissible in a particular case initially depends on whether that evidence is relevant." (*Id.* at p. 415.)

The trial court here initially rejected the BWS evidence, ruling: "If the theory of [Lee's defense] is I had nothing to do with the killing of those two women, what you're talking about is not relevant." The trial court later refused, on Evidence Code section 352 grounds, to allow the introduction of BWS evidence to rebut the prosecution's attack on Lee's credibility.

After Lee finished testifying, defense counsel tried to introduce evidence from a BWS expert (Dr. Vianne Castellano), whose report had concluded Lee was a severely battered woman who "presents a diagnostic impression of a severe dissociative disorder characterized by both the dissociative amnesia and dissociative fugue." The trial court rejected this evidence too: "There is nothing in this report that deals with the issues that are before the jury in this trial. The issues in this trial are, who killed [the victims], who, if anyone, aided and abetted in those crimes." The trial court limited Castellano's guilt phase testimony to evidence of any fugue state, amnesia or dissociative state between the time Lee had been stabbed and when she regained her memory the following Wednesday.

The trial court correctly concluded the BWS evidence would have exculpated Lee only if she had admitted taking part in the killings. Lee did not, however, present any kind of duress defense; she testified that she had had nothing to do with the murders. The contested issue at trial was whether Lee had taken part in killing the victims, not why she was involved, and thus the trial court properly excluded the BWS evidence.

Lee's arguments to the contrary are unpersuasive. She did not need BWS evidence to show that she and Carasi had ended their relationship prior to the killings because she testified she broke the affair off after Carasi physically attacked her, and that she had already arranged to move into an apartment in Burbank. She did not need BWS evidence to explain her alleged acceptance of Carasi's dinner invitation the night of the murders; even if they had just broken up, having a meal in a restaurant in a public place hardly requires a special justification, particularly since Doris and Salinas were going to be there too. As for explaining why she stayed in contact with Carasi after the murders, BWS evidence had little probative value given the changed circumstances — i.e., that Lee and Carasi were now jointly accused of multiple murders -- and therefore exclusion on Evidence Code section 352 grounds for undue consumption of time and jury confusion would have been well warranted.

In any event, even if the trial court erred by refusing to admit this evidence, the error would have been harmless. There was an overwhelming amount of motive, planning, forensic, and consciousness of guilt evidence proving that Lee had joined Carasi in setting up and carrying out the deadly ambush.

3. *Evidence about Carasi.*

Lee contends the trial court erred by refusing to admit various items of evidence relating to Carasi. This claim is meritless.

a. *Entries from Carasi 's diary.*

Lee argues the trial court erred by excluding evidence consisting of entries from a diary Carasi kept during 1989. She argues this evidence of Carasi's "sexual fantasies and need for a partner willing to engage in ritualistic sex, including wearing a rubber suit and wrapping him in cellophane," was relevant because it demonstrated Carasi's "obsession with finding a sexual partner willing to engage in bizarre and ritualistic sex," and it raised an inference that Carasi must have been devastated when Lee left him. However, these diary entries had little probative value because they had been written four years before Carasi met Lee, and it appears the trial court only prevented Lee from mentioning this evidence in her opening statement, and that she never renewed the request to introduce this evidence.

b. *Prison letter from Carasi.*

Lee argues the trial court should have admitted a letter written to her by Carasi, while they were in jail awaiting trial, because it revealed that Doris had sexually abused Carasi when he was a child. The pertinent portion of the letter reads: "I keep thinking of all the things my mom did to me and that I didn't want the same thing to be done to my son. I have nightmares of what my mom did to me sexually and physically." Lee argues this evidence was relevant to explain Carasi's motive for killing Doris. But this was not very probative because the evidence already showed Carasi had a motive for killing his mother -- that

she had been taking Salinas's side against him -- and such a letter written in jail after Carasi had been charged with Doris's murder was hardly reliable.

c. *Carasi's statement to Detective McWilliams.*

Lee argues the following comments made by Carasi to Detective McWilliams should have been admitted: that he was going to break off with Lee in order to return to Salinas for the sake of the baby; that he was angry at Doris for calling Michael her little son; that he wanted Doris dead. Again, there was already evidence that Carasi had a motive for killing Doris. Lee argues the evidence was relevant to rebut the prosecution theory that there had been an ongoing romantic relationship between Carasi and her. But here again, the post-murder statement is not very reliable. Moreover, it conflicts with the theory described in subsection (a) above that Lee was the one who ended the relationship.

d. *Strange sexual practices.*

Lee argues she should have been allowed to introduce specific evidence of the strange sexual practices she and Carasi engaged in because this would have shown just how outraged Carasi must have been when Lee announced she was leaving him. However, the trial court allowed her to testify generally regarding the nature of their sexual relationship. Lee testified that on their first date, when she thought they were going to have sex, Carasi shocked her by just wanting to masturbate in front of her. Subsequent sexual encounters were pretty much the same. One of Carasi's regular practices was to lie on his stomach naked and masturbate while Lee lay on top of him. Carasi touched her "[s]ometimes." Characterizing these activities as "really weird, something different" and "[t]oo kinky. It wasn't me," Lee testified the sex did not satisfy her, but

that she stayed with Carasi because she wanted to please him and because she had nowhere else to go. It is unclear what would have been accomplished by admitting further steamy details regarding rubber suits and cellophane wrapping. In addition, the inference Lee seeks to draw from this evidence is weak; one could just as easily postulate an opposite inference — that Carasi, knowing how socially transgressive his chosen sexual practices were, would have repressed any anger he felt when Lee said she was leaving him.

In any event, as discussed in relation to Issue #2 above, even if the trial court did err by excluding any of this evidence, the error would have been harmless given the overwhelming evidence against Lee.

4. *Provocation instruction.*

Lee contends the trial court erred by refusing to give CALJIC No. 8.73 (evidence of provocation may be considered in determining degree of murder). This claim is meritless.

"[W]here the evidence of provocation would justify a jury determination that the accused had formed the intent to kill as a direct response to the provocation and had acted immediately, the trial court is required to give instructions on second degree murder under this theory. The fact that heated words were exchanged or a physical struggle took place between the victim and the accused before the fatality may be sufficient to raise a reasonable doubt in the minds of the jurors regarding whether the accused planned the killing in advance." (*People v. Wickersham* (1982) 32 Cal.3d 307, 329, disapproved on other grounds by *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) Accordingly, CALJIC No. 8.73 (1992 Revision) provides: "If the evidence establishes that there was

provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for such bearing as it may have on whether the defendant killed with or without deliberation and premeditation."

Lee argues the trial court was required to give this instruction upon request because it amounted to a lesser included offense instruction and a general principle of law related to the evidence. "The sua sponte duty to instruct, and a fortiori, the responsibility to provide instructions on request, in connection with a lesser offense exists when there is substantial evidence to support the defendant's culpability of the necessarily included crime." Lee is wrong.

Lee's reliance on such cases as *People v. Barton* (1995) 12 Cal.4th 186, is misplaced. *Barton* concerns a trial court's duty to instruct on lesser included offenses such as voluntary manslaughter, whereas "CALJIC No. 8.73 is a 'pinpoint' instruction (see *People v. Saille* (1991) 54 Cal.3d 1103, 1119 . . .) that relates particular facts to an element of the charged crime and thereby explains or highlights a defense theory. (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1734 . . .) The trial court is not required to give such an instruction on its own initiative, . . ." (*People v. Mayfield* (1997) 14 Cal.4th 668, 778.) *Saille* held that a pinpoint instruction highlighting evidence that could negate the elements of premeditation and deliberation "does not involve a 'general principle of law' as that term is used in the cases that have imposed a sua sponte duty of instruction on the trial court." (*People v. Saille* (1991) 54 Cal.3d 1103, 1120; see *People v. Ervin* (2000) 22 Cal.4th 48, 91 [*Saille* ruled that instructions on

voluntary intoxication aimed at negating premeditation and deliberation "are more in the nature of pinpoint instructions required to be given only on request where the evidence supports the defense theory"]; *People v. Middleton* (1997) 52 Cal.App. 4th 19, 32-34 [under *Saille's* reasoning, using provocation evidence to negate deliberation element is not a defense]; *People v. Lee* (1994) 28 Cal.App.4th 1724, 1734 [CALJIC No. 8.73 is "not an instruction on a defense," but rather "an instruction that related certain evidence to an element of the crime and attempted to raise a reasonable doubt as to that element. Such an instruction is a pinpoint instruction under *Saille*, and as such, need not have been given sua sponte."].)

The trial court properly refused to give CALJIC No. 8.73 because it was not supported by any substantial evidence and because it was inconsistent with Lee's testimony and her theory of the case — that she had had nothing to do with the attack on the two murder victims.

5. *Lying in wait special circumstance not unconstitutional.*

Lee contends the lying-in-wait special circumstance statute (§ 190.2, subd. (a)(15)) is unconstitutionally vague and overbroad, and violates the Eighth Amendment, because it fails to provide a meaningful basis for distinguishing a subcategory of murders warranting more severe punishment. She argues that, without the elements of actual concealment and a killing that occurs during the period of concealment, the narrowing function of the statute compared to first degree murder lying in wait has been vitiated and the statute rendered unconstitutional. This claim is meritless.

Lee faces two problems with this claim. First, she lacks standing to raise any Eighth Amendment issues.

"The Eighth Amendment requires that state sentencing guidelines clearly distinguish between criminals sentenced to death and those not sentenced to death. *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). However, the Supreme Court has refused to extend this rule to require states to distinguish between criminals sentenced to LWOP and those sentenced to LWP [Citation.]" (*Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 906, fn. omitted.) The defendant in *Houston* -- convicted of first degree murder for hiding outside his wife's office with a shotgun and shooting her when she left the building — argued "that the California Penal Code violates the Eighth Amendment by establishing vague and arbitrary guidelines for determining when the death penalty may be imposed. *Houston* specifically argues that the line between non-capital first degree murder by means of lying in wait and capital first degree murder with the special circumstance of lying in wait has become blurred and makes imposition of the death penalty vague and arbitrary " (*Id.* at pp. 906-907.) The Ninth Circuit held the defendant "lack[ed] standing to bring this argument because he was not sentenced to death." (*Id.* at p. 907.)

Second, case law has held the statute is not vague and overbroad. Lying in wait as a special circumstance requires an intentional killing while lying in wait, whereas lying in wait as a basis for first degree murder requires a murder perpetrated by means of lying in wait. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1140, fn. 2; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1022.) *People v. Morales* (1989) 48 Cal.3d 527, 557, held that the three factors defining the lying-in-wait special circumstance — concealment of purpose, a substantial period of watching and waiting, and a surprise attack on an unsuspecting victim immediately after the watching and waiting —

"present[] a factual matrix sufficiently distinct from 'ordinary' premeditated murder to justify treating it as a special circumstance." Since *Morales*, constitutional and instructional challenges to the lying-in-wait special circumstance have been consistently rejected. (See *People v. Sims* (1993) 5 Cal.4th 405, 432-433; *People v. Edelbacher, supra*, 47 Cal.3d at pp. 1019-1023.)

The Ninth Circuit in *Houston* also rejected a claim section 190.2, subd. (a)(15), was unconstitutionally vague. "Houston argues that non-capital first degree murder by means of lying in wait is indistinguishable from capital first degree murder with the special circumstance of lying in wait and therefore encourages arbitrary and discriminatory enforcement. [¶] In this case, the California legislature and courts have created a thin but meaningfully distinguishable line between first degree murder lying in wait and special circumstances lying in wait. [Citation.] First degree murder is statutorily defined as 'murder which is perpetrated by means of . lying in wait.' Cal.Penal Code § 189. Special circumstance murder is statutorily defined as murder where the 'defendant intentionally killed the victim while lying in wait.' Cal.Penal Code § 190.2(a)(15) . . [¶] . Unlike special circumstances murder while lying in wait, first degree murder by means of lying in wait does not contain a temporal requirement. [Citation.] Because there is a distinction between first degree murder by means of lying in wait and capital murder with the special circumstances of lying in wait, California Penal Code § 190.2(a)(15) does not encourage arbitrary enforcement, and is not unconstitutionally vague." (*Houston v. Roe, supra,* 177 F.3d at pp. 907-908, fn. omitted.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN,P J.

We concur:

CROSKEY, J.

ALDRICH, J.

APPENDIX L

FILED

Aug 17 2015

Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONNA KAY LEE,	)	No. 12-56258
	)	
Petitioner-Appellant,	)	D.C. No. 2:01-cv-
	)	10751-PA-PLA
v	)	Central District
	)	of California,
DEBRA JACQUEZ,	)	Los Angeles
	)	
Respondent Appellee.	)	ORDER
	)	

Before: SCHROEDER, PREGERSON, and NGUYEN, Circuit Judges.

Judges Schroeder, Nguyen, and Pregerson have voted to deny the petition for panel rehearing. Judges Pregerson and Nguyen have voted to deny the petition for rehearing en banc, and Judge Schroeder so recommends.

The full court has been advised of the petition, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P 35.

The petitions for rehearing and rehearing en banc are DENIED.

RECORD AND BRIEFS

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FILED
MAR 17 2016
OFFICE OF THE CLERK

No. 15-789

IN THE

Supreme Court of the United States

DONNA K. JOHNSON, WARDEN,

Petitioner,

v.

DONNA KAY LEE,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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SUPREME COURT, U.S.

Respondent, by her undersigned counsel, asks leave to file the attached Brief in Opposition to the Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*. Respondent was represented by counsel in the Ninth Circuit under the Criminal Justice Act, 18 U.S.C. § 3006A(b).

This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

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DATED: March 17, 2016

By: _____

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No. 15-789

IN THE

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DONNA K. JOHNSON, WARDEN,

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v.

DONNA KAY LEE,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Like other states, California has a longstanding rule requiring that record-based claims be raised on direct appeal rather than in habeas corpus petitions. *In re Dixon,* 41 Cal. 2d 756 (1953). Over the years, however, the rule was inconsistently applied, prompting the California Supreme Court to clarify the rule in 1993 and again in 1998. In denying state habeas relief to Respondent Donna Kay Lee, the California Supreme Court ruled that some of her claims should have been raised on direct appeal and thus were barred under *Dixon.* In federal habeas proceedings, Petitioner, the State of California, asserted that the *Dixon* bar applied by the California Supreme Court precluded federal review of the barred claims. The question presented is:

> Did the court of appeals correctly determine that California's *Dixon* bar was not adequate to preclude federal review of Lee's claims, where Lee presented evidence that state courts at the time of her 1999 appeal had continued to apply *Dixon* inconsistently, and where the State's purported rebuttal evidence was unresponsive to the question of whether or not the bar was being consistently applied in 1999?

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BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Donna Kay Lee respectfully requests that this Court deny the State's petition for certiorari seeking review of the Ninth Circuit's opinion in this case. The decision is reported as *Lee v. Jacquez*, 788 F.3d 1124 (9th Cir. 2015) (*see* Pet. App. A).

STATEMENT OF THE CASE

I. Initial State and Federal Habeas Proceedings

Despite evidence that Lee was a victim of Battered Woman Syndrome and despite a joint trial with her accused batterer, Donna Lee was convicted of participating in the murder of her boyfriend's ex-girlfriend and his mother. She was sentenced to life without parole. (Pet. App. 149a, 150a.) Her boyfriend was sentenced to death. (Pet. App. 150a.) On June 10, 1999, Lee appealed her conviction to the California Court of Appeal. (Pet. App. 137a-162a.) She raised four claims, which were denied on August 28, 2000. (*Id.*) Her subsequent petition for review was denied by the California Supreme Court in December 2000. (Pet. App. 163a.) California does not appoint habeas counsel for non-capital inmates, so Lee represented herself after direct appeal.

In December 2001, Lee filed a timely pro se federal habeas petition that included several new claims. (Pet. App. 79a.) The district court granted a stay of federal proceedings so that Lee could exhaust her claims in state court. (*Id.*) Lee

filed a petition in superior court, which was denied, in part, on the basis of *In re Dixon*, 41 Cal. 2d 756 (1953). (Pet. App. 134a-135a.) *Dixon* requires California petitioners to raise record-based claims on appeal, rather than in habeas corpus proceedings. It is a mandatory bar, meaning that courts are required to apply the rule where the defaulted claims are based on the record. *Dixon*, 41 Cal. 2d at 759 ("the writ *will* not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.") (emphasis added). After the *Dixon* bar has been applied, courts may consider whether any of four exceptions to the bar apply [1] If any are found, state courts will review the merits of the claim, despite the petitioner's failure to raise the claim on direct appeal. In Lee's case, the superior court did not apply any of these exceptions.

Lee filed a subsequent habeas petition in the California Court of Appeal, which also denied her claims with citation to other procedural bars but without citation to *Dixon*, though the claims were the same as the court below had denied on that basis. (Pet. App. 132a.) Then the California Supreme Court denied Lee's petition for review, citing *Dixon* and other procedural rules not relevant here. (Pet. App. 131a.)

---

[1] The exceptions are: 1) "the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process"; 2) there was an unwaivable lack of "fundamental" jurisdiction in the trial court; 3) the trial court imposed a sentence in "excess of jurisdiction"; or 4) a "new rule of law" created between the time of direct appeal and the time of post-conviction review would affect the petitioner's case. *In re Harris*, 5 Cal. 4th 813, 834, 836-841 (1993); *see also In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) (applying *Harris* exceptions to the *Dixon* rule).

After exhaustion was complete, the district court lifted the stay and ruled on the federal petition. (Pet. App. 75a-76a.) It denied four of Lee's claims on the merits and found the rest of the claims to be procedurally barred under *Dixon*. (Pet. App. 77a.) Lee appealed the merits denial of two claims and the finding of procedural default on the other claims.

II. First Ninth Circuit Appeal

On appeal, Lee was appointed counsel for the first time. In her counseled brief, Lee argued that the *Dixon* bar was not an adequate and independent state law ground that could bar federal review of her claims. (Pet. App. 74a.) Her argument addressed the second step in the three-step procedure to determine a bar's adequacy and independence set forth by the Ninth Circuit in *Bennett v. Mueller*, 322 F.3d 573 (9th Cir. 2003). Under *Bennett*, the state must first raise procedural default as an affirmative defense. 322 F.3d at 585. The burden to challenge that defense then shifts to the petitioner. *Id.* at 586. At this second step, the petitioner must "satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule." *Id.* Should that requirement be satisfied, at the third step, the State bears the ultimate burden to show that "the state procedural rule has been regularly and consistently applied in habeas actions." *Id.*

Proceeding under step two of *Bennett*, Lee proffered evidence that *Dixon* was not adequate because it was not consistently applied at the time of Lee's purported default in June 1999. (9th Cir. case no. 08-55919, dkt. no. 39, Appellant's Opening

Brief, at 23.) She pointed to the California Supreme Court's own jurisprudence, which showed that as late as August 1998, *Dixon*'s application was unclear. (*Id.* at 24-26, citing *In re Robbins*, 18 Cal. 4th 770 (1993) (altering the bar by mandating that the *Harris* exceptions were to apply to the *Dixon* bar from that point forward); *Bennett*, 322 F.3d at 582 (recognizing "that a California court's pre-*Robbins* denial of a state habeas petition for a *Dixon* violation does not bar subsequent federal review").) Lee also showed that in December 1999 – the same month her petition was denied – the California Supreme Court invoked the *Dixon* rule in less than ten percent of its habeas denials, even though many petitions included record-based claims that could have been raised on direct appeal. (*Id.* at 33-37.)

The Ninth Circuit determined that Lee met her burden at step two of *Bennett* and remanded to give the state an opportunity to present evidence of the *Dixon* bar's independence and adequacy. (Pet. App. 74a.) The court affirmed the denial of Lee's other claims on the merits. (Pet. App. 73a-74a.)

III. District Court Proceedings on Remand

Upon remand, the State raised two arguments regarding procedural default. First, it claimed that *Walker v. Martin*, 562 U.S. 307, 131 S. Ct. 1120 (2011), implicitly overruled the three-step process in *Bennett v. Mueller* for proving the adequacy of a procedural bar. (C.D. Cal. case no. 01-cv-10751-PA-PLA, dkt. no. 141, Appellee's Brief, at 6.) Under *Martin*, the State argued, procedural bars are presumptively adequate and must be "independently evaluated" by the court without regard to any evidentiary burdens. (*Id.* at 13, citing *Martin*, 131 S. Ct. at 1129.)

In the alternative, the State argued that, even under *Bennett*, it could meet its burden to prove *Dixon*'s adequacy. (*Id.* at 13.) To do this the State surveyed approximately 4,700 habeas dismissals by the California Supreme Court covering a two-year period, and reported that, in each of the months included in that survey, the *Dixon* bar had been cited in anywhere between seven and twenty-one percent of the denials, averaging about twelve percent. (*Id.* at 20.) The State concluded that this finding alone demonstrated that, over the relevant time period, "the *Dixon* bar was both firmly established and regularly followed by the California Supreme Court." (*Id.*)

The district court rejected "respondent's unsupported assertions in its Response that the Supreme Court in *Walker v. Martin* 'implicitly overruled *Bennett*'s three-step burden-shifting process,' and that respondents no longer bear the ultimate burden of proving the adequacy of a procedural bar." (Pet. App. 52a n.6.) But it found that that the State met its burden to prove adequacy under *Bennett*'s third step. (Pet. App. 66a.)

IV Second Ninth Circuit Appeal

On appeal, the State abandoned its argument that it should not bear the ultimate burden of proving adequacy. (*See, e.g.*, 9th Cir. case no. 12-56258, dkt. no. 20, Appellee's Brief, at 12.) Instead, the State argued that it met its burden under *Bennett* by showing that *Dixon* was applied to twelve percent of cases over a two-year period around the time of Lee's 1999 direct appeal. (*See id.* at 30; Pet. App. 17a.)

The Ninth Circuit disagreed. First, it held that *Martin*, on which the State heavily relied, was focused on California's timeliness bar for state habeas petitions, which is "inherently discretionary in its initial application, while the *Dixon* rule is mandatory in the first instance." (Pet. App. 11a.) For non-discretionary rules, this Court left unaltered its repeated recognition that federal courts must examine the adequacy of state procedural rules by analyzing their regular and consistent application. (Pet. App. 12a-13a, quoting *Martin*, 131 S. Ct. at 1130.) The appellate court also held that the State's attempt to meet their burden under *Bennett* was unpersuasive, because "*Dixon*'s application to twelve percent of all habeas denials tells us almost nothing about the rule's consistent application and, therefore, its adequacy." (Pet. App. 20a.) Because of this, the court held that "the state failed to meet its burden of proving the *Dixon* bar's adequacy at the time of Lee's procedural default." (Pet. App. 6a.)

REASONS FOR DENYING THE WRIT

I. The Lower Court's Decision Was Limited to the Facts of this Case and Does Not Implicate State or National Interests

The State frames its first question presented as a categorical referendum on the adequacy of the *Dixon* rule: "whether, for federal habeas purposes, California's procedural rule generally barring review of claims that were available but not raised on direct appeal is an 'adequate' state-law ground for rejection of a claim." (Pet. 1.) This formulation suggests that the court below held *Dixon* inadequate for all California cases at all times. Not so. The Ninth Circuit made clear that its holding was limited to "the *Dixon* bar's adequacy *at the time of Lee's procedural*

default." (Pet. App. 6a (emphasis added).) Even on that narrow question, the court's ruling was limited to the State's statistically defective record in this case. The State remains entirely free to relitigate the question and develop a better record establishing the *Dixon* bar's adequacy in any future case.

Because the court's holding was restricted to the facts and circumstances of this case – a *Dixon* default that occurred nearly seventeen years ago and an analytically flawed defense of the bar by Petitioner – it has little to no application to any other case, much less to any "fundamental principles and interests at the heart of this Court's habeas jurisprudence." (Pet. 21.)

In arguing for certiorari, Petitioner also erroneously suggests that the appellate court imposed a new and unduly high burden for the state to prove adequacy:

> The court of appeals all but directed the State, as the price of federal respect for a common procedural bar rule, to review the case files of thousands of habeas dispositions and establish for each case whether the state court could and should have applied the *Dixon* bar rule rather than ruling on whatever other ground it did.

(Pet. 19.) But the court of appeals did no such thing – not in this case, and not in *Bennett*.

A procedural bar is an affirmative defense which, like any other affirmative defense, must ultimately be proved by the party asserting it. In *Bennett*, the Ninth Circuit set forth a procedural, burden-shifting framework for establishing how the pre-existing burden could be met, but did not include many details. It acknowledged that "[t]he scope of the state's burden of proof will be measured by

the specific claims of inadequacy put forth by the petitioner." *Bennett*, 322 F.3d at 584-85 (quoting *Hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir. 1999)). *Bennett* also explained that the state may meet its burden by providing "records and authorities [that] prove whether its courts have regularly and consistently applied the procedural bar." *Id.* at 585. But it did not dictate which records the State must produce, or how it must prove the adequacy of any particular bar. Rather, it left the State free to decide how to meet its burden at step three.

And in fact, that is precisely what happened in this case. It was the State – not the court – that decided that a "statistical analysis would be the best way to demonstrate the [*Dixon*] rule's regular and consistent application" at step three. (Pet. App. 20a.) It was the State that chose to review approximately 4,700 summaries of case holdings from the California Supreme Court, covering a randomly chosen period, and count how many times within those summaries *Dixon* was cited. (Pet. App. 17a.) It was the State that chose to divide that number of mentions of *Dixon* by the total number of case summaries it looked at, and present the average – the number twelve percent – as somehow dispositive of adequacy. (*Id.*) As the opinion of the court below noted, this calculation "merely shows *Dixon*'s application as a percentage of *all* habeas denials filed during this time period, and does not purport to show to how many cases the *Dixon* bar *should* have been applied." (*Id.*, emphases in original.) Thus the number was irrelevant to the question of consistent application and the Ninth Circuit held that the State failed to meet its burden under *Bennett*.

In so holding, the court was clear that it had not imposed any new burdens on the State: "We do not suggest that the state must always use a statistical analysis to prove a rule's adequacy, and nor do we set any precise statistical bar that must be reached." (Pet. App. 20a.) Generally, "the state need not necessarily reach a high statistical bar in order to prove its affirmative defense." (Pet. App. 14a.) But here, where "the state chose to use just such a statistical framework," and then presented "only a partial statistical picture" that "tells us almost nothing" about the rule's adequacy, the State failed to carry its burden. (Pet. App. 20a.)

Notably, the State itself admitted that the records that might actually establish that the *Dixon* bar was consistently applied "were likely available," but it chose not to avail itself of those records to make its showing. (*Id.*) In other words, the State chose to prove the adequacy of the *Dixon* bar by using a statistical analysis, but neglected to perform a complete analysis. Thus the State vastly overstates the burden placed upon it, and the reach of the Ninth Circuit's holding in this case.

This overstatement pervades the petition for certiorari, as well as the amici briefs. Together, they suggest that the Ninth Circuit has rejected *Dixon* and *Dixon*-type procedural rules *in toto*, such that states will universally be impeded from requiring record-based claims to be raised on direct appeal. (Pet. 21, Amici Brief of Alabama, etc., 13.) For example, the State claims that under *Lee*, "a [record-based] claim could be properly presented in federal habeas proceedings – in the first instance, and for review *de novo*." (Pet. 21.) Petitioner claims that the ruling

"permits (or even encourages) litigants to withhold claims from the state court in their primary appeal." (*Id.*) The states' amici brief incorrectly cites the Ninth Circuit's holding as "finding inadequate California's rule barring criminal defendants from bringing on collateral review claims that should have been raised on direct appeal but were omitted." (Amici Brief of Alabama, etc., 1.) The states justify their interest in the petition as based on the fact that all fifty states apply similar procedural bars. (*Id.*) These dire predictions have no basis in the Ninth Circuit's factually limited determination that the State chose here an unconvincing method to demonstrate one bar's inadequacy at one point in time.

This is perhaps why no jurist on the Ninth Circuit Court of Appeals objected in any way to this decision or sought its reconsideration. The panel decision was unanimous and no judge dissented from denial of en banc review. No jurist even requested a vote on the petition for the rehearing. (Pet. App. 163a.) If, as is alleged by Petitioner, this opinion truly had major potential consequences for California, the rest of the Ninth Circuit states, and all other states, it is likely that at least one Ninth Circuit jurist would have called for en banc review. But the panel that decided the case clearly limited its holding to the facts of this case, without in any way foreclosing further attempts to establish the *Dixon* bar's adequacy in other cases. Thus, the holding below does not provide the opportunity for this Court to reach the broad question presented by the State (the adequacy of the *Dixon* bar generally), nor does it merit certiorari review.

II. There Is No Circuit Split

Petitioner's second question presented asks "[w]hether, when a federal habeas petitioner argues that a state procedural default is not an 'adequate' state-law ground for rejection of a claim, the burden of persuasion as to adequacy rests on the habeas petitioner (as in the Fifth Circuit) or on the State (as in the Ninth and Tenth Circuits)." (Pet. i.) The State made the same argument in 2003 when it unsuccessfully petitioned for certiorari review of *Bennett*. The State essentially is attempting to use Lee's case as a vehicle once again to seek review of *Bennett*. But then, as now, there is no meaningful circuit split requiring this Court's attention. The burden-shifting schema of the Fifth Circuit appears different from that of the Ninth and Tenth Circuits because it is founded on a different type of rule; but in fact the procedures function the same way.

The Fifth Circuit decided the question before it in a manner that was specific to the bar at issue – a bar constructed through the legislative process. *Sones v. Hargett*, 61 F.3d 410 (5th Cir. 1995). The bar was a three-year statute of limitations on post-conviction claims imposed by the Mississippi state legislature and expressly relied on by the court to bar collateral relief. *Id.* at 417. The circuit court thus assumed that the bar, as based on statute rather than court-created rules, was presumptively adequate. *Id.* at 416-17 Nevertheless, it acknowledged that "[t]he presumption of adequacy can be rebutted in certain circumstances ., if the state's procedural rule is not 'strictly or regularly followed.'" *Id.* at 416 (citations omitted).

By contrast, the Ninth and Tenth Circuits' foundational cases addressed court-created procedural rules. Such judicially created rules are, by their nature, more susceptible to erratic application than the sort of bright-line legislative mandates the Fifth Circuit addressed in *Sones*. Thus the Ninth and Tenth Circuits began, not with an automatic presumption of adequacy, but rather with a requirement that the state assert a rule's adequacy to bar federal review. The burden then would shift to the petitioner to rebut that assertion.

At that point, both the Ninth and Tenth Circuits explicitly provided the state an opportunity to overcome the petitioner's rebuttal evidence. The Tenth Circuit ruled:

> Once the state pleads the affirmative defense of an independent and adequate state procedural bar, the burden to place that defense in issue shifts to the petitioner. This must be done, at a minimum, by specific allegations by the petitioner as to the adequacy of the state procedure. The scope of the state's burden of proof thereafter will be measured by the specific claims of inadequacy put forth by the petitioner.

Hooks, 184 F.3d at 1217; *see also Smallwood v. Gibson*, 191 F.3d 1257, 1268 (10th Cir. 1999) (same).

The Ninth Circuit in *Bennett*, similarly examining a court-created bar, adopted the framework laid out by the Tenth Circuit. First, the state must raise procedural default in federal court, thus averring its adequacy. 322 F.3d at 585. The petitioner must then rebut that assertion "by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule." *Id.* at 586.

Should petitioner succeed in bringing the rule's adequacy into question, then the State has a chance to show that "the state procedural rule has been regularly and consistently applied in habeas actions." *Id.*

In effect, the procedure for determining the adequacy of a procedural bar functions the same way in all of the circuits that have proffered such a procedure. The Ninth and Tenth Circuits have a three-step burden-shifting process – state/petitioner/state – while the Fifth Circuit appears on its face to have only a two-step process – presumption/petitioner. In practice, however, the process in the Fifth Circuit does not end with the petitioner. Should the petitioner successfully present rebuttal evidence, the court does not end the inquiry there and declare the bar inadequate. In practice, the state is provided with a chance to address the rebuttal evidence and show the bar to be consistently and regularly applied. For example, in one case, a bar was asserted and presumed adequate. *Walker v. Stephens*, 583 Fed. App'x 402, 403 (5th Cir. 2014). The petitioner then argued that the rule was not adequate. *Id.* The final step was that the state conceded the inadequacy. *Id.* The court found that the bar did not preclude federal review. *Id.* In another Fifth Circuit case involving a court-created bar, the rule was initially presumed adequate. *Nixon v. Epps*, 111 Fed. App'x 237, 245 (5th Cir. 2004). The burden to rebut fell to the petitioner, who was unable to present any cases demonstrating irregularity in application. *Id.* Though the petitioner was unable to meet his burden, the court was "reluctant to foreclose the issue altogether *because*

the cases cited by the state are less than compelling." *Id.* (emphasis added). Thus the state was given the last word.

The Fifth Circuit appears to differ in its approach from the Ninth and Tenth Circuits because its foundational ruling was based on a different type of bar – legislative rather than judicial. Because of this, the Fifth Circuit began with the language of presumption of adequacy. The Ninth and Tenth Circuits, examining less inherently reliable rules, did not begin from a stated presumption, but rather required the state to support the idea of such a presumption by stating the rule's adequacy to foreclose federal review. In all circuits the burden then shifts to the petitioner to bring the bar into question. And in all circuits, the state is then given the final opportunity to challenge the rebuttal evidence and show the bar to be regularly and consistently applied and thus adequate. Thus there is no actual conflict.

Petitioner and amici here ask this Court to overturn *Bennett* and impose a Fifth-Circuit-style approach everywhere to procedural bars. They present the Fifth Circuit schema as placing the entire burden of proof on the petitioner. The underlying assumption is that the petitioner – who lacks resources and access to the necessary evidence – will be unable to establish inadequacy. However, should the petitioner succeed in doing so – as does occur – the states will never allow the courts to simply accept the rebuttal evidence and end the inquiry there, with a loss to the state. When a petitioner meets the burden of challenging a bar, the state will no doubt seek the last word. The State here is presenting a false split, and asking the

court to impose a burden-shifting approach which in fact it and the courts could not accept.

The State presented a similar argument as to conflict in 2003, when it petitioned for certiorari review of the *Bennett* case. That petition was denied. The situation has not changed since then. Thus here, as in 2003, certiorari review is not warranted.

III. The Decision in the Court Below Is Correct

Because this case does not implicate the *Dixon* bar generally, and there is no circuit split to resolve, the only issue is whether the case was properly decided. It was, and this Court should reject the state's unfounded request for error correction. United States Supreme Court Rule 10.

A. *Walker v. Martin* Does Not Render *Dixon* Adequate, nor Does It Abrogate Well-Established Principles of Procedural Default

As it did in the court below, the state argues that *Martin* extends to procedural bars other than the California timeliness bar specifically addressed in that case. (Pet. 13.) Under this theory, the entire federal doctrine of procedural default has been abrogated by *Martin*, though this Court explicitly states otherwise in the text of that opinion. But the Ninth Circuit correctly rejected this argument and this Court should not revisit that holding.

1. This Court's Well-Established Doctrine Requires that Non-Discretionary Bars Be Consistently Followed

The doctrine that a state procedural rule cannot bar federal review unless that rule is firmly established and consistently followed has long been accepted and applied. A state procedural rule is inadequate to bar federal review if the rule, on

its face or as applied, is arbitrary or violates due process. *Dobbs v. Zant*, 506 U.S. 357, 359 (1993) (per curiam). A rule is arbitrary and violates due process when it is not "strictly or regularly followed" by the state courts. *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982); *see also James v. Kentucky*, 466 U.S. 341, 348 (1984) (only state procedures that are "firmly established an regularly followed can prevent implementation of federal constitutional rights").

A rule that is "strictly or regularly followed" conforms to due process as it provides a petitioner with notice of a state court's expectations and practice. Thus a bar must be applied consistently where it is warranted. The State here alleges that Ninth Circuit case law is the sole source of this requirement that a rule be applied consistently, *i.e.*, where warranted, as opposed to just regularly. (Pet. 8.) This is not so. This Court's rulings require consistency in a bar's application, and have always done so. *See, e.g., Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar cases."); *Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012) ("A state court's invocation of a procedural rule to deny a prisoner's claims precludes federal review of the claims if, among other requisites, the state procedural rule is a nonfederal ground adequate to support the judgment and the rule is firmly established and *consistently* followed.") (emphasis added); *Johnson v. Mississippi*, 486 U.S. 578, 588-89 (1988) ("we cannot conclude that the procedural bar relied on by the Mississippi Supreme Court in this case has been *consistently* or regularly applied.") (emphasis added); *Dugger v. Adams*, 489 U.S. 401, 410-11 n.6

(when a state has followed a procedural rule in the "*vast majority of cases*," deviations in a "few cases" may not establish failure to apply the "procedural rule regularly and *consistently*" and may not be sufficient to establish the rule's inadequacy) (emphases added). Thus this Court has formulated the requirement for adequacy to include consistent application of a rule in the majority of cases where warranted.

2. *Walker v. Martin* Does Not Supersede the Doctrine of Adequacy and Independence with Regard to Non-Discretionary Bars

Petitioner mistakenly asserts that the long-held doctrine that procedural rules must be adequate and independent to forestall federal review has been overturned by *Martin*. Its underlying argument is that *Martin* did away with any requirement of consistency, and that the *sine qua non* of adequacy is now regularity, which the State proffers to mean that the rule has to be applied often even if it is not applied consistently.

Martin, however, did not purport to overturn prior case law calling for consistency. *Martin* merely recognized a limited exception where that requirement is relaxed. The case explicitly focuses only on the question of whether California's timeliness bar can be adequate even though it is discretionary. In fact, *Martin* emphasizes that the "decision leaves unaltered this Court's repeated recognition that federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights." *Martin*, 562 U.S. at 1130. Thus the State is incorrect in its assertion that *Martin*

universally eliminated the requirement that procedural bars be applied consistently if they are to be recognized as adequate and independent.

Martin extended the reasoning of *Beard v. Kindler*, 558 U.S. 53 (2009), to California's timeliness bar. In *Kindler*, this Court addressed the question: "Is a state procedural rule automatically 'inadequate' under the adequate-state-grounds doctrine – and therefore unenforceable on federal habeas corpus review – because the state rule is discretionary rather than mandatory?" 558 U.S. at 55. The Court found that, in certain cases, "a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review." *Id.* at 60. This Court explicitly kept its ruling narrow, however, in the face of the Commonwealth's urging to state a broad new standard for inadequacy, as "[t]he procedural default at issue here is hardly a typical procedural default." *Id.* at 62-63.

Two years later the Court revisited the issue raised in *Kindler* in the context of another discretionary procedural rule, California's timeliness bar. California's rule for timeliness in the filing of a habeas petition does not set a concrete, objectively measurable amount of time in which a petition must be filed, but instead requires petitioners to seek habeas relief "without substantial delay." *Martin*, 131 S. Ct. at 1125. Thus, as in the rule at issue in *Kindler*, discretion is built into the law. The Court found that the reasoning applied in *Kindler* was also applicable to this rule: if the exercise of discretion is appropriate in light of the subjective elements inherent in the rule, then the rule can be found adequate to foreclose federal review without a showing of consistency *Id.* at 1128. Such exercise of

discretion, however, must still have "fair and substantial support in prior state law," and avoid surprise and unfairness, or it may be adjudged inadequate as being applied arbitrarily to block federal court review. *Id.* at 1128, 1130.

In *Martin*, as in *Kindler*, this Court expressly limited its holding. In addition to making it clear that its reasoning is applicable to procedural rules inherently requiring discretion, the Court explicitly noted that "[t]oday's decision, trained on California's timeliness rule for habeas petitions, leaves unaltered this Court's repeated recognition that federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights." *Id.* at 1130. The Court was careful to note that "a state procedural ground would be inadequate if the challenger shows a 'purpose or pattern to evade constitutional guarantees' " *Id.* at 1131 (quoting *Kindler*, 558 U.S. at 65 (Kennedy, J., concurring)). It found no such showing was made, however, on the record before it in the *Martin* case. *Martin*, 131 S. Ct. at 1131. The opinion says nothing about other procedural rules, especially non-discretionary rules like *Dixon*, other than to direct federal courts to continue to carefully examine their adequacy. And, in fact, other courts post-*Martin* have continued to inquire into whether state procedural rules are regularly followed and consistently applied. *See, e.g., Lee v. Corsini*, 777 F.3d 46, 54 (1st Cir. 2015) (citing the "regularly followed" standard for adequacy); *Lark v. Sec'y Pa. Dep't of Corr.*, 645 F.3d 596, 613 (3d Cir. 2011) (distinguishing a "facially mandatory state procedural rule which was not clearly followed" from the discretionary rules evaluated in *Kindler* and *Martin*). The Ninth Circuit noted that

its sister circuits continued to engage in this inquiry, and that their actions buttressed its own conclusion in this case. (Pet. App. 13a n.5.)

The *Dixon* rule at issue here is not discretionary; no element is subjective. It bars from habeas consideration claims that could have been but were not raised on appeal. *See, e.g., Dixon*, 41 Cal. 2d at 759; *Robbins*, 18 Cal. 4th 770, 779 n.1 (1998). A claim falls into this category if it is based solely on the trial-court record. *Id.* The reasoning underlying this rule is that "habeas corpus cannot serve as a substitute for an appeal." *Dixon*, 41 Cal. 2d at 759. Courts are generally familiar with the categories of claims that are record-based, such as those citing issues with jury instructions, and those that are not record-based because they require further investigation and elaboration, such as those based on ineffective assistance of counsel. They quickly sort through habeas claims and dismiss under *Dixon* those that are record-based but were not raised on direct appeal.

Petitioner contends, however, that the reasoning applied by this Court to two discretionary rules must extend to the non-discretionary *Dixon* rule – and apparently to *all* procedural rules. Petitioner attempts to justify this unwarranted extension in two ways, neither of which is persuasive.

First, the State completely ignores the distinction made in the *Kindler* and *Martin* opinions between discretionary and non-discretionary rules. Both cases make clear that the issue is determining the adequacy of *discretionary* rules. The State, however, portrays those opinions as sweeping away all prior case law

regarding adequacy and independence for all rules, across the board. (*See, e.g.*, Pet. 11, 12.)

Second, the State attempts to convince the Court that any rule is "discretionary" if it allows for exceptions. The California Supreme Court has made it explicit that, when a record-based claim is first raised on habeas such that its consideration should be denied per *Dixon*, it will still review that claim on its merits should one of four rare exceptions apply: (1) fundamental constitutional error; (2) lack of fundamental jurisdiction; (3) a court acting in excess of jurisdiction; or (4) a change in the law. *Robbins*, 18 Cal. 4th at 814 n.34, citing *In re Harris*, 5 Cal.4th 813, 825 n.23, 829-41 (1993). According to the State, because the state court's procedures allow for review of claims under very limited circumstances, that rule is fully discretionary and falls under the *Martin* standard for adequacy review.

The court below, however, was not persuaded by this argument. The court perceived a clear difference between a standard such as that embodied in California's timeliness bar, which is inherently discretionary in its initial application, and a rule such as that expressed in *Dixon*, that is mandatory in the first instance. (Pet. App. 11a.) Under *Dixon*, a claim is barred if it could have been raised on direct appeal but was not. "Deciding whether a claim is barred by *Dixon* involves not a malleable, circumstance-specific question of 'reasonableness', but a straightforward review of the record: A claim is either record-based, or it is not, and the petitioner either raised it or omitted a claim on direct appeal." (*Id.*)

Inconsistent application of the bar thus reflects irregular, inadequate practice rather than an exercise of discretion. (*Id.*)

The court below noted another flaw in the State's contention that *Dixon*'s exceptions transform a mandatory rule into a discretionary standard. Most, if not all, procedural bars are subject to some categorical exceptions – including the timeliness bar at issue in *Martin*. "Yet *Martin* mentioned these exceptions only in passing," instead focusing "its analysis on the discretion inherent in the timeliness bar's initial application, rather than on the application of the bar's exceptions." (Pet. App. 12a.) Any discretion a court may have in deciding whether exceptions apply is exercised only *after* the *Dixon* bar has been applied. The Ninth Circuit correctly rejected the state's argument and there is no need for this Court to review the issue.

B. The Court Below Correctly Found that the *Dixon* Bar Was Not Adequate in June 1999

1. The California Courts Acknowledged Inconsistent and Irregular Application of the *Dixon* Bar Shortly Before the Bar Was Applied to Lee's Case

The *Dixon* rule was formulated in 1953. Forty years later, the California Supreme Court acknowledged problems in the bar's application. In 1993 the California Supreme Court undertook to "provide needed guidance" for application of the *Dixon* rule going forward. *Harris*, 855 P.2d at 395 n.3, 398. Five years later, in August 1998, the California Supreme Court was still substantially amending the *Dixon* rule "in order to provide guidance." *Robbins*, 18 Cal. 4th at 814 n.34. The court recognized the need to reformulate the rule and publish its revised

parameters to bring clarity and consistency to its application. As the Ninth Circuit found, *Robbins* purported to establish the adequacy and independence of the state court's future *Dixon* rulings. *Park v. California*, 202 F.3d 1146, 1153 & n.4 (9th Cir. 2000).

The law in the Ninth Circuit is that a default under *Dixon* occurs at the time the direct appeal is filed without the claim later raised in habeas. *Fields v. Calderon*, 125 F.3d 757, 761 (9th Cir. 1997) (procedural default under *Dixon* "occurs at the moment the direct appeal did not include those claims that should have been included for review"). Respondent filed her direct appeal on June 10, 1999. Thus, after forty-six years of failed attempts to apply the *Dixon* rule regularly and consistently, and within one year of Lee's purported default, the state itself acknowledged the rule's per se inadequacy.

Petitioner and the amici states argue that the Ninth Circuit's ruling in this case has an untenable impact on their own abilities to manage their courts. (Pet. 21; Amici Brief of Alabama, etc., 13.) But as the California Supreme Court's opinions in *Harris* and *Robbins* show, the problems with the *Dixon* bar's adequacy belong uniquely to California, and arguably, to the time period around when Lee filed her direct appeal. The issue addressed in the court below is distinctly local and temporally limited.

2. On the Record in this Case, the Ninth Circuit's Finding that Dixon Was Inconsistently Applied in 1999 Was Correct

In the first Ninth Circuit appeal, the court accepted Lee's evidence challenging the independence and adequacy of the *Dixon* bar, and remanded to the

district court to allow the State to attempt to meet its burden at the next step. (Pet. App. 74a.) The State has not appealed this finding that the second step under *Bennett* had been met, though it has attacked Lee's evidence in attempting to meet its own burden. (Pet. 9, 19.)

Lee presented evidence in the courts below that California had not corrected its courts' problems with irregular and inconsistent application of the *Dixon* bar around the time of Lee's purported default on June 10, 1999, and even in the following years. This evidence included an order list issued by the California Supreme Court on December 21, 1999 – six months after Lee's default[2] – in which that court denied approximately 210 habeas corpus petitions and only invoked the *Dixon* bar in about nineteen of them, less than ten percent of its habeas denials. (9th Cir. case no. 08-55919, dkt. no. 39, AOB, at 35.) Lee also analyzed a small sample of cases from that same order list. (*Id.*; *see also* Pet. App. 18a-19a.) This analysis reveals that, within that small sample, there are many cases where the state court did not invoke the *Dixon* bar even though the petitions presented record-

[2] Petitioner has faulted Lee for providing evidence from a period just after Lee's default date, rather than for the date itself. First, such evidence is still probative, as it is unlikely that the bar would have been inconsistently applied less than a year before her default and six months after, but would somehow have been consistently applied just between. "A procedural rule is either adequate or inadequate during a given time period." *King v. LaMarque*, 464 F.3d 963, 968 (9th Cir. 2006). Second, the evidence for the actual date in question was unobtainable to Lee, as it is for almost all petitioners in her position. Largely for this reason the burden of providing the evidence belongs on the State. "Although the burden of proving an affirmative defense is generally on the party asserting it, in this context, this placement is also the most just. It is the state, not the petitioner, often appearing pro se, who has at its hands the records and authorities to prove whether its courts have regularly and consistently applied the procedural bar." *Bennett*, 322 F.3d at 585.

based claims that could have been raised on direct appeal but were not. Thus, Lee demonstrated that the California Supreme Court did not apply the *Dixon* bar between August of 1998 and December of 1999 with the consistency required to bar federal merits review of orders issued between those dates. Lee's default date – June 10, 1999 – falls well within this period. Lee met her second-step burden. (Pet. App. 9a, 74a.)

At the third step, the State, with access to all of its own documents, gathered records for a large number (approximately 4,700) of habeas denials covering the two years surrounding Lee's alleged default. Petitioner counted the number of times the California Supreme Court cited to *Dixon* bars in its denials. It found that, month to month, *Dixon* citations appeared in anywhere from seven to twenty-one percent of the total cases. The average on the whole was approximately twelve percent of habeas denials that included citations to *Dixon*. (Pet. App. 16a.) Petitioner presented this calculation to the court below as dispositive – as proving conclusively that the bar was adequate at the relevant time. According to the State, at a twelve percent application rate, a rule is adequate, period. No explanation was given as to why this figure is dispositive of anything related to a bar's consistent application where merited.

The Ninth Circuit found the state's evidence unconvincing:

> We find this evidence entirely insufficient to meet the state's burden of showing the *Dixon* rule's adequacy. The state's evidence merely shows *Dixon*'s application as a percentage of *all* habeas denials filed during this time period, and does not purport to show to how many cases the *Dixon* bar *should* have been applied. Logic dictates

> that in order to know if invoking *Dixon* in twelve percent of all cases shows consistent application, we need to know "the number of times that claims to which the *Dixon* rule could apply were instead rejected on the merits." . Thus, we are missing the denominator that would give any meaning to the state's number. Without a baseline number against which to measure the twelve percent application rate, this percentage in no way indicates the consistency of the rule's application.

(Pet. App. 17a-18a; emphases in original; citation omitted.)

At oral argument, the State conceded that the records required to provide "the denominator that would give any meaning" to its numbers were likely available to it. (Pet. App. 20a.) Why it nevertheless chose to proceed with an incomplete statistical analysis remains unexplained.

Before Lee's case, all challenges in federal courts to California's *Dixon* bar have been decided at the first or second step of the *Bennett* framework. In first-step cases, the bar has been found to be adequate because it simply was alleged by the State, and the pro se petitioner was unable to meet his second-step burden "by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule." *Bennett*, 322 F.3d at 586. *See, e.g.*, *Flores v. Roe*, 228 F. App'x 690, 691 (9th Cir. 2007) (pro se petitioner failed to place the defense at issue as required under *Bennett*); *Sanchez v. Ryan*, 392 F Supp. 2d 1136, 1138-39 (C.D. Cal. 2005) (pro se petitioner offered "nothing in response to Respondent's allegation, much less any specific factual allegations demonstrating inconsistent application of the *Dixon* rule"); *Protsman v. Pliler*, 318 F Supp. 2d 1004, 1008-09 (S.D. Cal. 2004) (finding of adequacy due to the petitioner's lack of showing).

In rare instances a petitioner has been able to meet his burden at the second step, without any third-step response by the state – resulting in a finding against the State. *See, e.g.*, *Dennis v. Brown*, 361 F Supp. 2d 1124 (N.D. Cal. 2005) (petitioner introduced citations to approximately 200 cases decided between 1980 and 2003 showing inconsistent application of procedural bars for successive or untimely claims, or those falling under the *Dixon* rule; and State did not meet its third-step burden); *Carpenter v. Ayers*, 548 F Supp. 2d 736, 756-57 (N.D. Cal. 2008) (petitioner effectively challenged *Dixon* bar adequacy primarily by citation to *Brown*; State did not counter).

Lee appears to be the first case where, after a petitioner met her second-step burden, the State made an attempt to meet its third-step burden. The State is not foreclosed from trying again in another case, and next time presenting evidence that is not meaningless but is actually probative of adequacy – unless, of course, California courts had *not* in fact remedied their self-admitted problems applying the *Dixon* bar by the time of Lee's default. In that case the State should not be attempting to block federal review of petitioners' claims on the basis of a rule that, on its face or as applied, is arbitrary or violates due process. *Dobbs*, 506 U.S. at 359. Either way, the Ninth Circuit's decision was correct and certiorari is not warranted.

IV. The Case's Posture Is Interlocutory and the Issues Presented by the State Are Insufficiently Developed

Finally, this Court should deny certiorari because the procedural posture in this case remains interlocutory. This outcome is not final; the Ninth Circuit

remanded the case to the court below. The outcome there could be determined on factors not raised here. For example, Lee also challenged the independence of *Dixon* bar. (9th Cir. case no. 12-56258, dkt. no. 7, AOB, at 34-38.) The Ninth Circuit did not decide this issue, which thus remains to be determined and could impact the case's result. (Pet. App. 3a.)

In addition, the issues presented by Petitioner and amici are not sufficiently developed to merit this Court's attention. Few circuits have decided on the procedures to apply in the determination of a bar's adequacy and independence, and even fewer times has a final outcome been tested in federal appellate courts. This reflects the fact that petitioners – incarcerated and lacking knowledge and resources – are most often unable to meet even the "modest" burden placed on them to challenge the bar. The State also often declines to present evidence regarding *Dixon*'s adequacy, preferring strategically to seek merits review instead. Thus this is hardly an issue of national importance that must be addressed now.

Petitioner and amici, however, have presented a parade of horribles that they allege will result from the State's failed attempt in this case to prove a bar's adequacy. None of their allegations are at all likely, but should any of them prove correct in any way, that will be borne out in future cases. As the situation stands, only one incomplete attempt has been made to prove adequacy in only one case, on the basis of a procedural schema that had been in place since 2003, for a rule that has existed since 1953, and with a result that could be determined by extraneous

factors on remand. The issues presented by Petitioner remain largely undeveloped, and this case does not merit certiorari review.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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DATED: March 17, 2016

By: _____

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March 17, 2016

Clerk of the Court
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Re: **Re: 15-789, Deborah K. Johnson v. Donna Kay Lee**

Dear Clerk:

Enclosed for filing:

1) Motion to Proceed Informa Pauperis and the Brief of Respondent in Opposition to the Petition for Writ of Certiorari (original and 10 copies)

2) Certificate of Service (original and 10 copies)

Also, enclosed is a cover page of each to conform and send back in the prepaid postage stamped envelope.

Sincerely,

Dolores Ramos
Legal Assistant to Marta VanLandingham
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No. 15-789

IN THE

Supreme Court of the United States

DONNA K. JOHNSON, WARDEN,

Petitioner,

v.

DONNA KAY LEE,

Respondent.

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CERTIFICATE OF SERVICE

I, Marta VanLandingham, a Deputy Federal Public Defender in the Office of the Federal Public Defender, do declare that on March 17, 2016, as required by Supreme Court Rule 29, I served the **MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI** on each party to the above proceeding and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid and by electronic service via email.

The names and addresses of those served are as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 17, 2016.

MARTA VANLANDINGHAM*
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RECORD AND BRIEFS

No. 15-789

Supreme Court, U.S.
FILED
APR - 4 2016
OFFICE OF THE CLERK

In the Supreme Court of the United States

DEBORAH K. JOHNSON, WARDEN, *Petitioner,*

v.

DONNA KAY LEE, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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This case presents two questions: Whether federal habeas courts must respect, as an "adequate" state procedural bar, California's rule requiring defendants to raise their claims on direct appeal; and whether the burden of proof with respect to adequacy rests on a habeas petitioner or on the State. Because every State applies some version of the same procedural rule (*see* Alabama Br. 1 & n.2), the case is also an ideal vehicle for considering more generally what sort of regularity of application makes a state procedural bar "adequate" for purposes of federal habeas review.

California's *Dixon* rule is long-established and regularly applied (Pet. 3, 7), and serves purposes this Court has long recognized as compelling (Pet. 23). The decision below holds that the State nonetheless failed to prove that the rule is "adequate," because the State did not, by analyzing the records of thousands of state cases, demonstrate that state courts apply the rule "mechanically," in every or almost every case in which it could possibly be applied. Pet. 9-11, 12-15. That approach is far different from allowing federal habeas review where a State has improperly closed the doors of its own courts by invoking a procedural bar in some way that is unfairly surprising or arbitrary or discriminates against federal claims. *See* Pet. 20. Instead of serving the adequacy doctrine's purposes, the decision below deepens a conflict over allocation of the burden of proof (Pet. 16-18), undermines fundamental principles of federal habeas review (Pet. 19-22)—and threatens to impose an extraordinary burden on the federal courts, which must now review de novo claims that state courts have never entertained because they were not raised on direct appeal. It warrants review by this Court.

1. Lee contends primarily (Opp. 6-10) that the decision below involves only the "adequacy" of one

procedural rule as applied by one State. But the court's opinion will govern every adequacy challenge to any procedural bar in every Ninth Circuit State. To avoid de novo review of a claim that a habeas petitioner failed to advance using appropriate state-court mechanisms, States must now prove to the court of appeals' satisfaction that their courts apply a given bar "mechanically." Pet. App. 11a. A petitioner's "'modest'" showing of purportedly variable application—here, nine cases where state courts denied relief on the merits rather than under a possibly applicable *Dixon* bar—may require a State to research the records of hundreds or thousands of other cases to divine whether and why a bar was applied or not applied in each. Pet. 9-11. States that cannot bear that burden, or that grant their courts discretion to reject meritless claims on the merits instead of applying potentially available procedural bars, will be punished by having those bars disregarded on federal habeas no matter how plain the petitioner's default. Pet. 14-15, 20-21. Federal habeas courts will have to review hundreds or thousands of corresponding claims de novo. If the court of appeals' decision were as narrow and inconsequential as Lee suggests, every other State in the Ninth Circuit (and 16 others) would not be joining California in urging review. Alabama Br. 1.

Lee also argues that the decision below holds *Dixon* inadequate only as to the period surrounding Lee's 1999 default (Opp. 6-7); but courts responsible for applying the decision have perceived no such limitation. *See Jaustraub v. Frauenheim*, 2016 WL 785284, at *2 (E.D. Cal.) (*Lee* "eviscerated" the *Dixon* bar).[1] Moreover, Lee's argument demonstrates just

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[1] *See, e.g., Olic v. Knipp*, 2015 WL 10438925, at *4-5 (C.D. Cal.) (holding procedural bar unenforceable under *Lee* for (continued...)

how burdensome the Ninth Circuit's approach is. Under the decision below, no application of the *Dixon* bar can be effective in federal habeas unless the State, having obtained and reviewed countless case files, shows which ones applied, and which could have supported, a *Dixon* default. Federal courts will then have to evaluate whether that amounts to a showing of the bar's "mechanical[]" application. That California, other States, and the courts might have to undertake this exercise not just once per bar, but over and over, period-by-period, only *increases* the burden imposed.

2. As to the circuit conflict over who bears the burden of persuasion on issues of adequacy (Pet. 17), Lee argues (Opp. 11-12) that the Ninth and Tenth Circuits have addressed "court-created" procedural rules, while the Fifth Circuit considered a "legislative" rule.[2] But each circuit's rule, whatever its origin, applies to all state procedural defaults. There is no reason to believe the Ninth or Tenth Circuits would enforce a different burden for state rules enacted by statute. *E.g.*, Alabama Br. 1 n.2 (listing state statutory equivalents to *Dixon*).[3]

Lee also argues that under any approach the State will assert default, the prisoner will challenge

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(...continued)
Dixon default that occurred during 2012 appeal); *Murphy v. Ducart*, 2015 WL 6549092, at *4 (C.D. Cal.).

[2] Lee does not discuss the differences between the Ninth and Tenth Circuits' standards, or internal inconsistencies in Second and Fourth Circuit doctrine. Pet. 17-18 & n.9.

[3] As Lee observes (Opp. 11, 15), this Court denied review when the Ninth Circuit adopted its burden rule in *Bennett v. Mueller*, 322 F.3d 573 (9th Cir. 2003). But at that time the rule had never been applied. *Id.* at 586. The decision in this case applies the rule, with startling results. The issue is thus well-positioned for review.

adequacy, and the State "will no doubt seek the last word." Opp. 14. Undoubtedly, whenever the issue is joined both sides will offer whatever evidence and arguments they have. What matters, however, is not the order of proof but the ultimate burden of persuasion—and the sort of proof required to meet it. *Cf. U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-715 (1983) (focus in discrimination litigation must be on "ultimate factual issue," not on parsing the analytical burden-shifting framework). Lee's arguments do not undercut the conflict over and importance of those issues.[4]

3. Who bears the burden of establishing "adequacy" and what must be shown to establish it are fundamentally related. Here, California showed that its courts routinely applied the *Dixon* bar, invoking it in hundreds of dismissals around the time of Lee's default. Pet. App. 17a. Lee, in contrast, pointed to nine cases in which relief was denied on the merits where it might have been possible to deny relief under *Dixon* instead. Pet. App. 55a. Neither Lee nor the court of appeals ever found any instance of a state court *granting* relief despite a *Dixon* default. They did not contend that *Dixon* is invoked to discriminate against federal claims or disfavored petitioners, or that reasonable direct-appeal counsel would have misunderstood whether failure to advance a record-based claim on appeal would bar raising the claim later. Yet the decision below faults the

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[4] Lee suggests in passing that in the court below the State "abandoned its argument that it should not bear the ultimate burden of proving adequacy." Opp. 5. In her appellate briefing, however, Lee argued that the State was "improperly placing the burden of proof on the petitioner." Lee C.A. Reply Br. 7 (Dkt. No. 30). In any event, the court of appeals squarely addressed the burden issue (*e.g.*, Pet. App. 8a-9a, 14a-17a), and Lee does not argue that it is not properly presented for review.

State for not responding to Lee's slight showing of purported "inconsistency" by examining some four thousand case files to prove the number of "'cases [to which] the *Dixon* bar *should* have been applied.'" Opp. 8. Lee does not appear to contest that, in the Fifth Circuit, her case would have come out the other way.

Lee contends the State "vastly overstates the burden placed upon it" (Opp. 9), because the court of appeals disclaimed requiring any particular statistical showing (Opp. 8, arguing that *Bennett* "did not dictate which records the State must produce, or how it must prove the adequacy of any particular bar"). But Lee, like the court of appeals, signally fails to suggest what less burdensome showing would be acceptable. As one court in the Ninth Circuit has observed:

> Although not banning [it] *per se*, the opinion leaves little doubt that the *Dixon* procedural default is completely ineffectual in federal habeas—absent a statistical analysis of enormous time and expense (a case-by-case analysis for a set of thousands of state habeas cases when the bar should have been utilized by the state courts, but was not, and then compared to cases in which the bar was utilized), or some other undefined, non-statistical analysis or event which [the court] cannot conceive of at the present time.

Jaustraub, 2016 WL 785284, at *2. In the name of avoiding unfairness to state prisoners, the decision below forbids reliance on a common state procedural bar rule, while giving States and district courts no guidance concerning any reasonable showing the

State could make to secure federal respect for its rule.

Lee does not solve this problem by saying (Opp. 24 n.2) that States are better positioned than prisoners to research underlying case files—even if one accepts the assertion of a comparative advantage.[5] Fundamentally, the comparison is irrelevant if the burden being imposed cannot be justified in the first place.

4. The question of what showing is necessary or sufficient to prove or disprove adequacy is of broad importance, and well presented for consideration in this case. Unlike *Beard v. Kindler*, 558 U.S. 53, 63 (2009), where an atypical procedural default provided "an unsuitable vehicle for providing broad guidance on the adequa[cy] ... doctrine," this case involves procedural default under a rule that is universal in American courts. The Court may therefore squarely answer whether "adequacy" for federal habeas purposes demands, as the decision below holds, that a rule be "mechanically" applied. Pet. App. 11a.

a. The cases from this Court that Lee cites (Opp. 16-17) do not require any such thing, whether under the rubric "consistently applied" or "regularly followed" (*see, e.g., id.*; Pet. 8, 12). Lee's two cases

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[5] The State's resources, too, are constrained, and many petitioners—like Lee herself—have counsel when contesting the adequacy of a bar. Pet. App. 32a-33a (noting 2008 appointment of counsel). Counsel—particularly institutional counsel such as the federal public defender's office, capably representing Lee here—could presumably pool efforts addressing common procedural bars. Moreover, those challenging *Dixon*'s adequacy would have had constitutionally-guaranteed counsel at the time any claim was omitted on direct appeal. If a default results from that counsel's ineffectiveness, it does not bar habeas review. *Dretke v. Haley*, 541 U.S. 386, 394 (2004). Lee has made no such claim here. Pet. 4 n.3.

holding a bar inadequate involved quite different concerns. When *Johnson v. Mississippi*, 486 U.S. 578, 587-588 (1988), observed that a rule had not been "consistently or regularly applied," the default at issue was based on failure to raise a claim in a type of hearing that the state supreme court had previously made clear was "not the appropriate forum" for such claims. In *Barr v. City of Columbia*, 378 U.S. 146 (1964), concern that procedural rules must be "appl[ied] evenhandedly to all similar cases" (Opp. 16) made perfect sense in the context of assuring that special burdens were not arbitrarily imposed on disfavored defendants—there, African-Americans protesting segregation.[6]

A non-mechanical approach, moreover, is fully consistent with "the entire federal doctrine of procedural default" (Opp. 15). Federal courts can and should "carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights." *Walker v. Martin*, 562 U.S. 307, 321 (2011). They can and should hold a state ground "inadequate when 'discretion has been exercised to impose novel and unforeseeable requirements.'" *Id.* at 320. *See generally Kindler*, 558 U.S. at 63-64 (Kennedy, J., concurring) (noting adequacy concerns where procedural requirement is "novel," or there is some "indication that the [state court] adopted its forfeiture rule out of ...

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[6] *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989), did not require mechanical application of a state rule. In observing that a rule's "faithful[] appli[cation]" in "the vast majority of cases" was more relevant than a "few" counterexamples, *Dugger* refused to view purported inconsistencies as undermining the adequacy of a sound general rule. *Dugger*, unlike the court below (*see* Pet. App. 18a), also refused to treat a case as evidence of insufficiency when it was not clear whether a bar was applied. *Id.*

hostility toward legitimate constitutional claims"). Instead of concentrating on these factors, however, the decision below focuses the inquiry on questions that are either irrelevant to, or undermine, the adequacy doctrine's fundamental concerns.

b. It is hard to imagine, for example, why federal courts should treat a state case as invidiously "inconsistent" simply because the state court bypassed a possibly applicable procedural bar and instead denied relief on the merits. *See* Pet. 14-15; *Martin*, 562 U.S. at 319 (finding "no reason to reject California's time bar simply because a court may opt to bypass the [timeliness] assessment and summarily dismiss a petition on the merits if that is the easier path"). Similarly, it serves no purpose to require, in effect, that state courts must always first "mechanically" apply a rule, and only then note the applicability of an exception (Opp. 2)—or that, when multiple defaults apply, each must be separately noted (Pet. App. 19a). Such requirements hinder state court systems' self-management without advancing any aim of the adequacy doctrine.

There likewise is no reason to view state courts' occasional explanation or refinement of a bar as an admission of "inconsistency," as Lee and the decision below do with respect to *In re Harris*, 5 Cal. 4th 813 (1993), and *In re Robbins*, 18 Cal. 4th 770 (1998). *See* Opp. 22-23; Pet. App. 15a. *Harris* viewed *Dixon* (and the complementary rule precluding habeas relitigation of claims resolved on direct appeal, *see* Pet. 5 n.5) as "firmly established and often repeated," but deemed it "important to reexamine and reiterate [their] purpose," lest those longstanding rules become (in Justice Holmes' words) "'encysted in phrases and thereafter for a long time cease to provoke further analysis.'" 5 Cal. 4th at 826. The court's reexamination showed that the relevant statutes, rules, and

decades of precedent were in alignment: "absent strong justification, issues that could be raised on appeal must initially be so presented, and not on habeas corpus in the first instance." *Id.* at 826-829. *Harris*'s one alteration to precedent was to hold that, in light of the "evolution" of this Court's Sixth Amendment doctrine, certain defaults that had previously been assessed under *Dixon*'s exception for "fundamental constitutional error" should instead be evaluated as questions of ineffective assistance of appellate counsel. *Id.* at 830-834. Apart from that change (which is irrelevant here), *Harris* simply reviewed and applied existing doctrine. *E.g.*, *id.* at 836-841. And there is no basis for Lee's characterization of *Robbins* as "substantially amending the *Dixon* rule 'in order to provide guidance.'" Opp. 22 (quoting *Robbins*, 18 Cal. 4th at 814 n.34). In context, *Robbins*'s "guidance" (not amendment) involved the court "comment[ing] briefly upon various disparate aspects of our order practice," to explain how its summary orders should be interpreted, 18 Cal. 4th at 814 n.34—another clarification that is irrelevant here.

Every system restates and refines procedural rules over time. Such a process should not, without more, make a rule unclear or inadequate for federal habeas purposes. *Cf. Kindler*, 558 U.S. at 65 (Kennedy, J., concurring) ("A too-rigorous or demanding insistence that procedural requirements be established in all of their detail before they can be given effect in federal court would deprive the States of the case law decisional dynamic that the Judiciary of the United States finds necessary and appropriate for the elaboration of its own procedural rules.").

Finally, the court of appeals' stress on "mechanical" application requires unfounded limitations on the applicability of this Court's recent precedent. This Court has warned that the adequacy doctrine

must respect the need for state-court discretion in the application of procedural bar rules. Pet. 22. Lee, like the court below, seeks to limit that principle to rules involving some "inherently discretionary" term (Opp. 20-21), such as the "prompt[ness]" requirement that was at issue in *Martin*. But neither Lee nor the court of appeals identifies how such a limitation would serve "'[s]ound procedure,'" *Martin*, 562 U.S. at 320-321, or avoid unsatisfactory incentives, *id.* (warning it would be "'particularly unfortunate'" if States "'opt for mandatory rules to avoid the high costs that come with plenary federal review'" because the adequacy doctrine "forced [them] to choose between mandatory rules certain to be found 'adequate,' or more supple prescriptions that federal courts may disregard as 'inadequate'"). Lee similarly does not identify how the adequacy doctrine's central concerns are advanced by ignoring the special respect that is due to procedural rules that are widespread in the States, *Kindler*, 558 U.S. at 62, or that are "'substantially similar to those to which we give full force in [federal] courts,'" *Martin*, 562 U.S. at 318. *See* Pet. 15. If this Court's cases have indeed left any ambiguity in these respects, the need for further clarification is another reason for review here.

* * *

The decision below does not simply affect state courts' ability to enforce their own procedural rules. It allows habeas petitioners, intentionally or not, "'to avoid the exhaustion requirement by defaulting their federal claims in state court.'" *Martin*, 562 U.S. at 316. It forces States to expend extraordinary resources to gain federal recognition of even the most basic, widespread, and commonsense rules of procedure. And it imposes unnecessary and unjustified work on the federal courts, both in evaluating challenges to adequacy and in reviewing, de novo and

without the benefit of any prior state review, claims which would otherwise be procedurally barred. These effects of the decision, and the burdens it imposes on the States, are both broadly important and wholly unjustified. They warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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April 4, 2016

No. 15-789

In the Supreme Court of the United States

DEBORAH K. JOHNSON, WARDEN,
PETITIONER,

v.

DONNA KAY LEE,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ALABAMA, ALASKA, ARIZONA, COLORADO, FLORIDA, HAWAII, IDAHO, KANSAS, MAINE, MICHIGAN, MISSISSIPPI, MONTANA, NEVADA, NORTH CAROLINA, NORTH DAKOTA, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether, for federal habeas purposes, California's procedural rule generally barring review of claims that were available but not raised on direct appeal is an "adequate" state-law ground for rejection of a claim.

2. Whether, when a federal habeas petitioner argues that a state procedural default is not an "adequate" state-law ground for rejection of a claim, the burden of persuasion as to adequacy rests on the habeas petitioner (as in the Fifth Circuit) or on the State (as in the Ninth and Tenth Circuits).

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INTEREST OF *AMICI CURIAE*[1]

Alabama, Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Kansas, Maine, Michigan, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, and West Virginia are States concerned that the Ninth Circuit's requirement that States apply procedural bars "mechanically and consistently" in order for those bars to qualify as independent and adequate in federal habeas misapplies this Court's precedents and threatens to undermine the procedural bar altogether. As this Court has cautioned before in reversing the Ninth Circuit on this same issue, procedural bars "ought not be disregarded automatically upon a showing of seeming inconsistencies." *Walker v. Martin*, 562 U.S. 307, 320 (2011). The lower court ignored this admonition, finding inadequate California's rule barring criminal defendants from bringing on collateral review claims that should have been raised on direct appeal but were omitted. All fifty States have enacted similar procedural bars, either by statute, procedural rules, or through case law.[2]

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[1] Consistent with Rule 37.2(a), the *amici* States provided notice to the parties' attorneys more than ten days in advance of filing.

[2] *See* Ala. R. Crim. P. 32.2(a)(5); Alaska Stat. § 12.72.020; Ariz. R. Crim. P 32.2(a); *Mackey v. State*, 690 S.W.2d 353, 354 (Ark. 1985); Colo. R. Crim. P 35(c)(3)(VII); *Gray v. Comm'r of Correction*, 854 A.2d 45, 47 (Conn. 2004); *Johnson v. State*, 460 A.2d 539, 540 (Del. 1983); Fla. R. Crim. P. 3.850(c); *Black v. Hardin*, 336 S.E.2d 754, 755 (Ga. 1985); Haw. R. Penal P. 40(a)(3); Idaho Code § 19-4901(b); *People v. Coleman*, 660

The Court should grant the writ and reverse, either summarily or after full briefing and argument.

N.E.2d 919, 927 (Ill. 1995); *Stephenson v. State*, 864 N.E.2d 1022, 1028 (Ind. 2007); Iowa Code § 822.8; *State v. Kingsley*, 326 P.3d 1083, 1087 (Kan. 2014); *Leonard v. Com.*, 279 S.W.3d 151, 156 (Ky. 2009); La. Code Crim. Proc. art. 930.4(C); Me. Stat. tit. 15, §§ 2128(1), 2128-A; Md. Code Crim. Proc. § 7-106(b); *Rodwell v. Com.*, 732 N.E.2d 287, 289 (Mass. 2000); Mich. Ct. R. 6.508(D); *Townsend v. State*, 723 N.W.2d 14, 18 (Minn. 2006); Miss. Code § 99-39-21(1); *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. 2000); Mont. Code § 46-21-101(2); *State v. Suggs*, 613 N.W.2d 8, 11 (Neb. 2000); Nev. Rev. Stat. § 34.810(1)(b)(2); *Avery v. Cunningham*, 551 A.2d 952, 954 (N.H. 1988); N.J. R. Ct. 3:22-4(a); N.M. Stat. § 31-11-6(F); N.Y. Crim. Proc. Law § 440.10(2)(c); N.C. Gen. Stat. § 15A-1419(a)(3) & (b)(2); N.D. Code § 29-32.1-12(2)(a); *State v. Perry*, 226 N.E. 2d 104, 109 (Ohio 1967); *Cannon v. State*, 933 P.2d 926, 928 (Okla. 1997); Or. Rev. Stat. § 138.550(2); 42 Pa. Cons. Stat. § 9544(b); 10 R.I. Gen. Laws § 10-9.1-8; *Simmons v. State*, 215 S.E.2d 883, 885 (S.C. 1975); *Ramos v. Weber*, 616 N.W.2d 88, 91 (S.D. 2000); Tenn. Code § 40-30-106(g); *Ex parte Goodman*, 816 S.W.2d 383, 385 (Tex. Crim. App. 1991); Utah Code § 78B-9-106(1)(c); *In re Hart*, 715 A.2d 640, 641 (Vt. 1998); *Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974); W. Va. Code § 53-4A-1(c); *Wright v. State*, 718 P.2d 35, 37 (Wyo. 1986); Wis. Stat. § 974.06. Washington replaced its automatic procedural bar with an approach that permits constitutional arguments to be raised for the first time in a collateral attack, if the petitioner can establish actual prejudice or structural error. *Matter of Cook*, 792 P.2d 506, 510–511 (Wash. 1990). This approach is similar to the federal approach. *See Reed v. Farley*, 512 U.S. 339, 354 (1994).

INTRODUCTION AND SUMMARY OF ARGUMENT

The lower court's decision places an unprecedented burden on States seeking to enforce even regularly applied procedural bars. In *Lee v. Jacquez*, the Ninth Circuit reviewed the adequacy of a procedural bar similar to those enforced in the federal system and in every State—that in the absence of certain exceptions, courts will not hear claims on collateral review that "should have been raised on direct appeal but were omitted," known as the *Dixon* bar in California.[3] 788 F.3d 1124, 1126 (9th Cir. 2015).

The lower court challenged California to show that this routinely applied bar was firmly established and regularly followed. In response, the State produced evidence that of the 4,700 collateral review denials around the time Lee filed her direct appeal, twelve percent were procedurally barred for failing to raise a claim on direct appeal. But showing that the procedural bar was applied in nearly one in every eight cases was not enough for the lower court. Rather, the lower court opined that unless the State could show the total number of cases in which the procedural bar *could have been applied*, "this

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[3] Alabama courts have considered this a "well-settled principle of law" for more than fifty years. *See Cooper v. Wiman*, 145 So. 2d 216, 217 (Ala. 1962); *see also* Ala. R. Crim. P 32.2(a)(5) ("A petitioner will not be given relief under this rule based upon any ground which could have been but was not raised on appeal...").

percentage in no way indicates the consistency of the rule's application." *Id.* at 1133. The circuit court made the burden even greater on the State by refusing to exclude cases where denials may have silently applied the bar or cases involving guilty pleas, writing, "[u]nless the state points out an underlying *Dixon* default behind an ambiguous denial, we cannot assume that a silent adoption of *Dixon* occurred." *Id.* The practical impact of this decision is that, in the Ninth Circuit, petitioner's failure to properly raise a claim on direct review in state court does not prevent that petitioner from bringing the claim on federal habeas.

Under this standard, the State can only show a procedural bar is adequate if it can analyze every habeas proceeding, determine whether or not the procedural bar could have applied, and explain to the satisfaction of the federal court each of the cases in which the bar was not applied. The lower court gave no guidance as to what constitutes adequacy, refusing to "set any precise statistical bar that must be reached..." *Id.* at 1134. Instead, it held only that the state courts must apply the bar "mechanically and consistently," and that instances where the bar was not applied would constitute evidence of "the irregular application of the rule." *Id.* at 1130.

This approach ignores controlling precedent, including this Court's recent unanimous reversal of the Ninth Circuit in *Martin*. The lower court justified its novel approach by citing this Court's admonition in *Martin* that "federal courts must carefully examine state procedural requirements to ensure

that they do not operate to discriminate against claims of federal rights." *Id.* at 1131 (citing *Martin*, 562 U.S. at 321). But in performing that examination, the lower court ignored *Martin*'s guidance that federal courts should look to whether procedural bars are applied "to impose novel and unforeseeable requirements without fair or substantial support in prior state law" or are "applied infrequently, unexpectedly, or freakishly." *Martin*, 562 U.S. at 320.

If allowed to stand, the lower court's misguided approach threatens to allow the inadequacy exception to state procedural bars to swallow the rule whole. The Court should grant the petition to correct this error, either by summary reversal or after full briefing.

ARGUMENT

The lower court's approach to procedural bars contradicts controlling precedent in at least three ways. First, it ignores this Court's guidance on when a procedural bar is inadequate. Second, the burden it places on the State is inconsistent with the manner in which this Court has reviewed challenges to procedural bars. And finally, the lower court failed to properly consider the widespread application of rules equivalent to the *Dixon* bar, both at the federal and state level.

I. A procedural bar is inadequate only when it is novel, rarely applied, or applied in an arbitrary manner.

In taking an overly exacting approach to its review of the State's procedural bar, the Ninth Circuit ignored this Court's guidance. Procedural bars are grounded in "the general principle that federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds." *Dretke v. Haley*, 541 U.S. 386, 392 (2004). To ensure habeas petitioners are not unfairly prejudiced, the state rule in question must be "firmly established and regularly followed." *Beard v. Kindler*, 558 U.S. 53, 60 (2009).

The Court has explained that the purpose of the "firmly established and regularly followed" rule is to prevent unexpected or arbitrary bars to a petitioner's claim. To evade a procedural bar, a petitioner must show more than that "outcomes under the rule vary from case to case." *Martin*, 562 U.S. at 319. Rather, a rule may fail this test if "applied infrequently, unexpectedly, or freakishly," or if it is used "to impose novel and unforeseeable requirements without fair or substantial support in prior state law." *Id.* at 320.

Procedural bars may be adequate even if they "permit consideration of a federal claim in some cases but not others." *Kindler*, 558 U.S. at 60–61. A procedural bar is adequate even if in some cases state courts "opt to bypass the [bar] and summarily dismiss a petition on the merits, if that is the easier path." *Martin*, 562 U.S. at 319. In fact, members of

the Court have indicated that even a procedural bar that has "not been fully explicated in prior decisions" may be adequate, "absent a showing of a purpose or pattern to evade constitutional guarantees." *Kindler*, 558 U.S. at 65 (Kennedy, J., joined by Thomas, J., concurring).

Under this standard, if a petitioner should have known that his or her claim was potentially subject to a state procedural bar and fails to act accordingly, the Court will not set aside that bar as inadequate. *See Kindler*, 558 U.S. at 63–64 (Kennedy, J., joined by Thomas, J., concurring) (noting that the adequacy requirement protects litigants who "in asserting their federal rights, have in good faith complied with existing state procedural law"). Mathematical tests and rigid adherence to a certain standard are inappropriate.

But that is precisely what the Ninth Circuit required in the decision below. The lower court construed Supreme Court precedent allowing for flexibility and reasonability to apply only to a procedural bar that is "inherently discretionary in its initial application," one that requires "a case-specific evaluation in every instance, leading inevitably to varied outcomes." *Lee*, 788 F.3d at 1130. But the lower court argued that the *Dixon* bar "is meant to apply to all habeas claims that could have been raised on direct appeal but were not." *Id.* Therefore, the lower court reasoned, if a court *could* apply this

procedural bar, it *must* apply this procedural bar.[4] "Thus, California state courts should be able to apply the *Dixon* bar mechanically and consistently, and a failure to cite *Dixon* where *Dixon* applies does not reflect the exercise of discretion so much as it reflects the irregular application of the rule." *Id.* As such, even the State's evidence of the routine application of the *Dixon* rule was insufficient; "*Dixon*'s application to twelve percent of all habeas denials tells us almost nothing about the rule's consistent application, and, therefore, its adequacy." *Id.* at 1134.

The Ninth Circuit's mechanistic approach ignores both the spirit and the letter of this Court's precedent. While this Court has answered the adequacy question by evaluating whether a state rule is applied "infrequently, unexpectedly, or freakishly," the lower court's approach might render inadequate even the most widely and consistently applied procedural bar. Under the lower court's standard, it is irrelevant whether petitioner acted in bad faith or knew that the procedural bar likely applied to her claim. And the lower court's standard casts doubt on any "mandatory" procedural bar, as all such rules have exceptions.

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[4] This analysis is incorrect, as the *Dixon* bar includes four exceptions. *See In re Robbins*, 959 P.2d 311, 340 n.34 (Cal. 1998).

II. The lower court's novel approach is inconsistent with the manner in which this Court has reviewed challenges to procedural bars.

Instead of crafting a novel rule, the lower court should have applied this Court's analysis of the adequacy question in *Martin*. Like the habeas petitioner here, Martin argued that the procedural bar at issue, the *Clark/Robins* bar, was not regularly followed. As the State did here, California provided evidence of numerous denials on the basis of *Clark/Robins*. But unlike the lower court, this Court in *Martin* found that evidence to be compelling.

The Court was explicit—"Nor is California's time rule vulnerable on the ground that it is not regularly followed." *Martin*, 562 U.S. at 318. The Court found decisive that each year, "the California Supreme Court summarily denies hundreds of habeas petitions by citing [*Clark/Robins*]." *Id.* at 318. In fact, the Court noted, "On the same day the court denied Martin's petition, it issued 21 other *Clark /Robbins* summary denials." *Id.* at 319. The Court did not find it necessary to ask how many other cases could have been dismissed on *Clark/Robbins* grounds, nor did it hold against the State that it was "impossible to tell why the California Supreme Court decides some delayed petitions on the merits and rejects others as untimely." *Id.* (internal quotation marks and citations omitted). The widespread use of the procedural bar was sufficient. In fact, this Court supported its conclusion that state courts "regularly invoke" the *Clark/Robins* bar with a footnote citing

four California cases decided between 1999 and 2010. *Id.* at 319 n.6.

In this case, faced with the same argument and even more evidence, the lower court came to the opposite conclusion. Taking the approach endorsed by the Court in *Martin*, California "analyzed 4,700 California Supreme Court habeas denials surrounding the time of Lee's June 10, 1999 default..." *Lee*, 788 F.3d at 1133. The *Dixon* bar was invoked in twelve percent, or almost six hundred, of these cases. But unlike this Court in *Martin*, the lower court found "this evidence entirely insufficient to meet the State's burden of showing the *Dixon* rule's adequacy." *Id.* Instead, the lower court demanded a "denominator" that would "give any meaning to the state's number." *Id.*

The Ninth Circuit's approach would require States to comb through what the *Martin* Court called "a staggering number of habeas petitions each year," 562 U.S. at 307, to determine not only what *did happen* during the denial of habeas but what *could have happened*, including in denials involving guilty pleas, "multiple procedural bars" or rulings that are "ambiguous" or "silent" as to their reasoning. This Court required no such showing in *Martin*, a fact of which the lower court should have been well-aware.

This case is on all fours with *Martin*. The Court reversed the Ninth Circuit's erroneous decision in *Martin* unanimously. This case deserves similar treatment.

III. Every State and the federal courts apply a similar rule to the *Dixon* bar.

The lower court failed to consider the widespread application of rules equivalent to the *Dixon* bar, both at the federal and state level. As Justice Kennedy has warned, "The adequate state ground doctrine cannot be applied without consideration of the purposes it is designed to serve." *Kindler*, 558 U.S. at 63 (Kennedy, J., joined by Thomas, J., concurring). The Court has explained that in considering those purposes, it will look to the application of similar federal rules. "In light of the federalism and comity concerns that motivate the adequate state ground doctrine in the habeas context, it would seem particularly strange to disregard state procedural rules that are substantially similar to those to which we give full force in our own courts." *Kindler*, 558 U.S. at 62. It would be even stranger, the Court has noted, "to do so with respect to rules in place in nearly every State, and all at one fell swoop." *Id.*

The federal courts apply similar procedural bars to that announced in *Dixon*. Petitioners are barred from seeking relief under 28 U.S.C. § 2255 "if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him..." 28 U.S.C. § 2255(e). This Court also has stated that when a petitioner fails to raise a claim that can be "fully and completely addressed on direct review," that claim is "procedurally defaulted" on collateral review. *See Bousley v. United States*, 523 U.S. 614, 622 (1998); *Reed v. Farley*, 512 U.S. 339, 354 (1994) ("Where the petitioner—whether a state

or federal prisoner—failed properly to raise his claim on direct review, the writ is available only if the petitioner establishes cause for the waiver and shows actual prejudice resulting from the alleged violation.") (internal citations and quotation marks omitted).

All fifty States have enacted similar waiver provisions, either by statute, procedural rules, or through case law. *See* sources cited *supra* note 2.

The Court has recognized the important public policy considerations that underlie these rules. They include finality, judicial economy, and conservation of scarce resources. "Failure to raise a claim on appeal reduces the finality of appellate proceedings, deprives the appellate court of an opportunity to review trial error, and undercuts the State's ability to enforce its procedural rules." *Murray v. Carrier*, 477 U.S. 478, 491 (1986) (internal citations and quotation marks omitted); *Reed v. Ross*, 468 U.S. 1, 10 (1984) ("Each State's complement of procedural rules facilitates this complex process, channeling, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently.").

In *Ross*, the Court reviewed North Carolina's requirement that defendants "raise a legal issue on appeal, rather than on postconviction review..." *Id.* The Court explained that this requirement benefits both the States and criminal defendants. It "affords the state courts the opportunity to resolve the issue shortly after trial, while evidence is still available

both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal." *Id.* It also forces "the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." *Id.* at 10–11. If the Court were to simply disregard North Carolina's requirement or the *Dixon* bar, "these legitimate state interests may be frustrated." *Id.* at 11.

The lower court failed to take these considerations into account, just as it ignored the existence of a nearly identical federal rule. In doing so, it required the State meet a novel, expensive, and time-consuming burden before it could confidently exercise the most basic procedural bar. If allowed to stand, it is likely most States will choose not to bear these costs. Rather, as this Court warned in *Kindler* and *Martin*, if federal courts force States "to choose between mandatory rules certain to be found 'adequate' or more supple prescriptions that federal courts may disregard as inadequate," they will "opt for mandatory rules to avoid the high costs" of the alternative. *Martin*, 562 U.S. 321.

CONCLUSION

The Court should grant certiorari and reverse the court of appeals.

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IN THE

Supreme Court of the United States

DEBORAH K. JOHNSON, Warden,
Petitioner,

vs.

DONNA KAY LEE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether, for federal habeas purposes, California's procedural rule generally barring review of claims that were available but not raised on direct appeal is an "adequate" state-law ground for rejection of a claim.

2. Whether, when a federal habeas petitioner argues that a state procedural default is not an "adequate" state-law ground for rejection of a claim, the burden of persuasion as to adequacy rests on the habeas petitioner (as in the Fifth Circuit) or on the State (as in the Ninth and Tenth Circuits).

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IN THE

Supreme Court of the United States

DEBORAH K. JOHNSON, Warden,

Petitioner,

vs.

DONNA KAY LEE,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid,

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1. The parties have consented to the filing of this brief.

   Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the Court of Appeals for the Ninth Circuit has declared "inadequate" California's rule that claims on the trial record must be raised on appeal or else are defaulted. By brushing aside this rule, which is substantially the same as the rule followed in the federal system and most states, the Ccurt of Appeals has reopened a massive number of defaulted claims in the Nation's largest state, allowing them to be relitigated on federal habeas corpus with all the delay and expense that entails. This result is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Paul Carasi is the co-defendant of habeas petitioner Donna Kay Lee. On Mother's Day 1995, Doris Carasi (Paul Carasi's mother) and Sonia Salinas (mother of Paul Carasi's child) were stabbed to death in the parking garage of Universal Studios CityWalk in Los Angeles. See App. to Pet. for Cert. 138a, 141a-142a (opinion on direct appeal). Paul Carasi and Lee, who was living with Carasi at the time, were tried together for this crime. Carasi was sentenced to death, and Lee was sentenced to life in prison without parole. *Id.*, at 150a.

Lee was appointed counsel for appeal. The Court of Appeal considered five contentions and rejected them in a written opinion. *Id.*, at 137a-162a. The California Supreme Court denied discretionary review on December 13, 2000. *Id.*, at 136a.

Lee filed a petition for federal habeas relief on December 13, 2001. *Id.*, at 79a. After initially denying

a "stay and abey" motion, the District Court granted a second one on December 8, 2003. *Id.*, at 79a.[2]

A month before the latter ruling, Lee filed a state habeas corpus petition. This was denied by the trial court, and successive petitions were denied by the Court of Appeal and the California Supreme Court.[3] All three invoked the rule of *In re Dixon*, 41 Cal. 2d 756, 264 P 2d 513 (1953), that a claim that could have been, but was not, made on direct appeal will generally not be considered on habeas corpus. See App. to Pet. for Cert. 134a-135a (Superior Court); *id.*, at 132a (Court of Appeal); *id.*, at 131a (Supreme Court).

Following the California Supreme Court's denial, Lee filed an amended petition in federal court. See *id.*, at 81a (Magistrate Judge's 2007 Report and Recommendation). The Magistrate Judge found that the claims at issue here were *Dixon*-barred, *id.*, at 100a-101a, that *Dixon* was an adequate and independent state ground, *id.*, at 101a-102a, and that Lee had made no showing of either cause and prejudice or actual innocence. *Id.*, at 103a-104a. The District Court adopted the report and recommendation and denied relief. *Id.*, at 75a-76a. Lee appealed.

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2. It is not clear what, if any, "good cause for the petitioner's failure to exhaust [her] claims first in state court," *Rhines* v. *Weber*, 544 U. S. 269, 277 (2005), existed in this case.

3. In California, there is no appeal from denial of a writ of habeas corpus by the Superior Court, and a successive writ in the Court of Appeal is the normal means of obtaining review. See *Carey* v. *Saffold*, 536 U. S. 214 (2002). Review of the Court of Appeal's decision by the Supreme Court by the normal review procedure is available, however, and it is preferred over a successive writ. *In re Michael E.*, 15 Cal. 3d 183, 193, n. 15, 538 P. 2d 231, 237, n. 14 (1975). *Amicus* CJLF's attempts to reform California habeas procedure have been repeatedly killed in legislative committees upon opposition by the defense bar.

In an unpublished memorandum, the Court of Appeals affirmed as to those issues decided on the merits on direct appeal, applying the 28 U. S. C. § 2254(d) standard. *Id.*, at 72a-74a. However, the Court of Appeals reversed and remanded for a determination of the adequacy of the *Dixon* rule. *Id.*, at 74a.

On remand, with Lee now represented by counsel, *id.*, at 32a-33a, the Magistrate Judge found that the *Dixon* bar was regularly applied and that it was not applied " 'in a surprising or unfair manner.' " *Id.*, at 65a-66a. Further, Lee still made no showing of cause and prejudice or actual innocence, and therefore the claims were barred. *Id.*, at 69a-70a.

Again, the District Court adopted the report and recommendation. *Id.*, at 21a-25a. Again, Lee appealed, and again the Ninth Circuit reversed. *Id.*, at 20a. It remanded the defaulted claims for litigation on the merits. See *ibid.*

SUMMARY OF ARGUMENT

The Ninth Circuit has once again declared a state procedural default rule "inadequate" for a reason that has no basis in the policies behind the "adequate state ground" doctrine. As this Court held quite clearly in *Walker* v. *Martin*, when a claim can be dismissed on multiple grounds, a state court that chooses the most straightforward ground is acting properly. There is no federal policy requiring state courts to always go to the procedural ground first, and federal courts regularly employ a flexible choice of ground approach in analogous situations. Certiorari should be granted to reaffirm that a state rule need be "regularly followed" only in the sense that it is followed regularly enough to give fair notice to litigants.

The Ninth Circuit's needless disregard of a valid state rule is a source of waste and delay. Competent appellate lawyers properly winnow out weak claims to focus on the stronger ones, and federal habeas corpus should be focused on those stronger claims. By effectively repealing the exhaustion rule for claims defaulted on direct appeal, the Ninth Circuit requires the federal district courts in the Nation's largest state to litigate on the merits every claim that an imaginative inmate or lawyer can conjure up that might have been, but was not, raised on appeal. In a world of limited resources, every dollar spent litigating such claims is a dollar that might have been spent on more worthy claims.

In capital cases, it is routine in California for "exhaustion petitions" to include a massive number of claims, most obviously defaulted. The requirement for federal courts to litigate those claims on the merits is a significant contributor to the extreme delay in such cases, in violation of the rights of victims and, some would say, in violation of the rights of the inmates themselves.

If necessary, this case could be resolved summarily. The decision in this case is contrary to clear language in *Walker* v. *Martin*, and the Court need only confirm what should be obvious, *i.e.*, that this language applies across the board to all state procedural default rules.

ARGUMENT

I. The Ninth Circuit continues to declare state rules "inadequate" for reasons with no rational basis in policy.

Over six years ago, *amicus* CJLF noted that the adequate state grounds rule was an untidy area of the law. We urged the Court to expressly abandon the varying rubrics that had been offered throughout the years and frame the rule in a straightforward way that is consistent with the precedents but also makes clear the policy basis of the rule. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Beard* v. *Kindler*, No. 08-992, pp. 6-16, http://www.cjlf.org/briefs/Kindler.pdf. The Court declined our invitation based on the unusual nature of the default in the case. See *Beard* v. *Kindler*, 558 U. S. 53, 62-63 (2009).

Walker v. *Martin*, 562 U. S. 307 (2011), involved a more typical subspecies of default and was decided largely along the lines suggested, but unfortunate language from old cases was not expressly repudiated. *Kindler* and *Martin*, fairly read and properly understood, state the reasons for declaring a state procedural rule "inadequate," but some courts of appeals continue to follow their own earlier precedents based on a rigid interpretation of the earlier "firmly established and regularly followed" rubric of *James* v. *Kentucky*, 466 U. S. 341, 348-349 (1984).

The Ninth Circuit in the present case declared California's sensible rule "inadequate" in " 'a perverse way.' " *Kindler*, 558 U. S., at 62 (quoting *Henry* v. *Mississippi*, 379 U. S. 443, 463, n. 3 (1965) (Harlan, J., dissenting)). The rule is deemed inadequate because it is not applied in a way that the federal government has no policy reason whatever for requiring or encouraging. A fair reading of *Martin* would have made this error

clear, but the Court of Appeals chose to read *Martin* in a cramped way so as to make as little change as possible in its own precedents—the very precedents that led that court to the error that this Court unanimously reversed in *Martin* itself.

In a nutshell, habeas petitioner Lee claims that the California Supreme Court, in the process of deciding the "staggering number of habeas petitions" filed directly in that court, see *Martin*, 562 U. S., at 312-313, and n. 2, does not invoke the procedural rule at issue here as often as it might in the petitions it denies. See App. to Pet. for Cert. 55a. At the risk of sounding flippant, one is tempted to ask, "so what?" What conceivable federal interest is there in encouraging state courts to deny habeas corpus claims that are both defaulted and meritless on the ground that they are defaulted rather than on the ground that they are meritless?

The policy behind the "firmly established and regularly followed" requirement is to prevent state courts from forfeiting federal claims with procedural traps that fail to give the defendant fair notice of what he needs to do. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Walker* v. *Martin*, No. 09-996, pp. 16-21, http://www.cjlf.org/briefs/MartinC.pdf. In *James* v. *Kentucky*, 466 U. S., at 344-348, the default was that the defendant requested an "admonition" when he should have requested an "instruction," but the case law on that distinction was so confused that he did not have fair notice as to which would be considered proper on the no-adverse-inference issue until the Kentucky Supreme Court settled the question in his case.

No such trap is present in this case. The California Supreme Court gave criminal defendants very clear notice 62 years ago that they must make on appeal those claims that can be made on the trial record or risk

having those claims barred on habeas corpus. See *In re Dixon*, 41 Cal. 2d 756, 264 P. 2d 513 (1953); see also *United States* v. *Frady*, 456 U. S. 152, 165 (1982) (similar rule in federal cases "long and consistently affirmed").[4] Every competent criminal appellate lawyer knows the rule and knows what he must do on direct appeal to preserve the claim.

The Court of Appeals insists that "we need to know 'the number of times that claims to which the *Dixon* rule could apply were instead rejected on the merits,'" App. to Pet. for Cert. 17a, but completely fails to state any reason in policy or fairness why that should matter. There is simply no federal interest in forcing denials to be on procedural grounds rather than the merits. Both this Court and Congress have decided just the opposite for federal courts in analogous situations.

At one time, this Court followed a strict rule that a state prisoner's habeas petition with an unexhausted claim had to be dismissed as unexhausted no matter how patently meritless it may have been. See *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982). Congress took a dim view of the waste of resources that resulted from sending an obviously meritless claim back to the state courts only to return to federal court once again, and it amended the exhaustion rule in the Antiterrorism and

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4. The fact that application of the rule and its exceptions needed some refinement and clarification in 1993, *In re Harris*, 5 Cal. 4th 813, 826, 855 P. 2d 391, 396 (1993), does not mean that it was inadequate for the intervening 40 years. After all, exceptions to procedural default rules have been a work in progress in this Court for a long time. See, *e.g.*, *Martinez* v. *Ryan*, 566 U. S. __, 132 S. Ct. 1309, 1315, 182 L. Ed. 2d 272, 282 (2012) (making "narrow exception" to rule established 20 years earlier). To the extent that Ninth Circuit precedents indicate otherwise, see App. to Pet. for Cert. 15a, they should be expressly disapproved.

Effective Death Penalty Act of 1996. Federal courts are now expressly authorized by statute to look past the procedural irregularity and *deny* an unexhausted meritless claim on the merits, see 28 U. S. C. § 2254(b)(2), even though the bar remains strict as to *granting* claims.

The distinction between overlooking a procedural bar to deny a claim and overlooking such a bar to grant one is an important difference. If some habeas petitioners find their claims barred while others have the bars waived and their claims granted, that is unequal treatment and raises at least a question of whether some kind of invidious discrimination is afoot. See *Martin*, 562 U. S., at 321 (noting discrimination as key concern). On the other hand, if some petitions are denied on the merits and others are denied on procedural default, there has been no unequal treatment, even if the reason for taking a different path to the same result is not always clear. The orders all end with "denied," and that is what really matters.

Other than the now-partially-abrogated *Rose* v *Lundy* rule, only *Teague* v. *Lane*, 489 U. S. 288, 316 (1989), and subject-matter jurisdiction require a strict order of decision. See *Steel Co.* v. *Citizens for a Better Environment*, 523 U. S. 83, 94-95 (1998). Elsewhere, this Court has repeatedly held that when the moving party must clear multiple hurdles to get relief those hurdles need not be decided in a particular order, and if one is not cleared there is no need to decide the others.

One important factor in deciding which hurdle to examine first is the ease of decision. In *Lambrix* v. *Singletary*, 520 U. S. 518 (1997), the State asserted that the claim was both defaulted and *Teague*-barred. The Court was puzzled as to why the court of appeals went straight to *Teague* without mentioning default.

> "A State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system. We do not mean to suggest that the procedural-bar issue must invariably be resolved first; only that it ordinarily should be. Judicial economy might counsel giving the *Teague* question priority, for example, if it were *easily resolvable* against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law. Cf. 28 U. S. C. § 2254(b)(2) (permitting a federal court to deny a habeas petition on the merits notwithstanding the applicant's failure to exhaust state remedies)." *Id.*, at 525 (emphasis added).

The Court has similarly made the order of decision flexible in the areas of qualified immunity and ineffective assistance of counsel, with ease of resolving the case often being the basis of the choice. See *Pearson* v. *Callahan*, 555 U. S. 223, 236-237 (2009); *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984).

The vast majority of habeas corpus petitions are meritless, and a great many are obviously so. That was true six decades ago, see *Brown* v. *Allen*, 344 U. S. 443, 536-537 (1953) (Jackson, J., concurring in the judgment), and it remains true in our time. See N. King, F Cheesman, & B. Ostrom, Habeas Litigation in U. S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996, p. 52 (2007) (grant rate of 0.29% in noncapital cases); V Flango, Habeas Corpus in State in Federal Courts 61 (1994) (pre-AEDPA, few petitions granted in state or federal courts).

Procedural default questions can be complicated, as this Court noted in *Lambrix, supra*. In the case of the

Dixon rule, whether a claim could have been made on the appellate record may present difficulties if the record is supplemented with outside material.[5] Even when the rule clearly applies, the exceptions may present issues of some difficulty. One of the exceptions, for example, is a "new rule of law." See *In re Harris*, 5 Cal. 4th 813, 841, 855 P 2d 391, 407 (1993) (exception to rule against relitigating issue decided on appeal); *id.*, at 825, n. 3, 855 P 2d, at 395 (same exceptions apply to *Dixon* rule). As this Court is well aware from its *Teague* jurisprudence, deciding when a rule is new is not always straightforward. See, *e.g.*, *Graham* v. *Collins*, 506 U. S. 461 (1993) (5-4 decision).

We can expect, then, that it will not be unusual for a habeas corpus petition to present a claim that is probably defaulted but clearly meritless. Does the California Supreme Court violate some basic jurisprudential norm by disposing of the case on the ground that is more "easily resolvable against the habeas petitioner"? Of course not. Is there any reason in federal law, federal policy, or basic justice why such a practice should cause a state's rules to be branded "inadequate"? No, there is not, and *Martin* quite clearly so held. "We see *no reason* to reject California's time bar simply because a court may opt to bypass the *Clark/Robbins* assessment and summarily dismiss a petition on the merits, if that is the easier path." *Martin*, 562 U. S., at 319 (emphasis added).

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5. The Court of Appeals' assertion that "[a] claim is either record-based, or it is not," App. to Pet. for Cert. 11a, is patently untrue. Further, because claims tend to morph as the case proceeds, the point at which a claim becomes a different claim from the one made on appeal may also be obscure. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Berghuis* v. *Thompkins*, No. 08-1470, pp. 7-10, http://www.cjlf.org/briefs/ThompkinsV.pdf.

In a surreal attempt to evade the clear holding of *Martin*, the Court of Appeals goes off on a discourse about whether the *Dixon* rule is a mandatory rule or a discretionary rule. Nothing in this passage of *Martin* says or implies that it is limited to discretionary rules. The discretionary nature of the rule at issue in *Martin* was discussed while rejecting a different attack on the rule, that it was inadequate *because* it was discretionary. Rejecting that hangover from *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 234 (1969), was the main point of *Kindler*, 558 U. S., at 55[6], but *Martin* had some further cleaning up to do. See 562 U. S., at 316-318. The statement quoted above comes in *Martin*'s rejection of the argument that California's timeliness rule was not "regularly followed," a point on which the discretionary/mandatory distinction is irrelevant.

Finally, it is worth noting that the *Martin* Court did *not* think that it needed to know how many petitions that could have been denied under the *Clark/Robbins* rule were instead rejected on the merits. Cf. App. to Pet. for Cert. 17a. It was enough that hundreds of habeas petitions a year *were* rejected on that basis. See 562 U. S., at 318-319. The reason that is enough is obvious when one goes back to the "fair notice" basis of the adequacy rule. A rule is "regularly" applied if it is applied often enough that litigants know it is a serious potential ground for rejecting a claim that has not been properly raised, as opposed to some rarely used relic that gathers dust on a shelf but is dusted off to be applied freakishly and perhaps discriminatorily against a disfavored claim or claimant.

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6. Although *Kindler* does not mention *Sullivan*, it must be regarded as having overruled that case *sub silento*. And good riddance. See 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4026, pp. 494-495 (3rd ed. 2012) (criticizing *Sullivan*).

Amicus would prefer that the term "regularly applied" be abandoned altogether, considering how much misunderstanding it has caused. However, *Kindler* and *Martin* both use the term, so if it is to be kept its fair-notice purpose should be made explicit. That badly needed clarification alone is enough reason to grant certiorari in this case. Until the rule and its reason are clarified, some federal courts of appeals will continue to declare state rules inadequate with no rational policy basis for doing so.

II. Failure to respect state default rules causes waste and delay.

By declaring California's *Dixon* rule inadequate, the Ninth Circuit has effectively repealed the exhaustion rule, 28 U. S. C. § 2254(b), for all claims that can be made on the trial record. A criminal defendant can omit a claim from the direct appeal, "exhaust" it in a state habeas petition that will likely be denied under *Dixon*, and then proceed in federal court with a full-blown review of a claim never considered by the state courts. Along with disrespect for the state's judicial process, such a manner of proceeding has adverse practical effects. It wastes resources litigating claims that do not need to be litigated, and it aggravates the problem of delay, which is especially critical in capital cases.

A. Expense.

Not every conceivable challenge to a criminal judgment needs to be litigated. The law of criminal procedure and evidence is complicated enough that a very large number of claims can be conceived. In California capital litigation, an abusive petition that was "well over 500 pages long and by its own count

raise[d] 143 separate claims" was "by no means an isolated phenomenon." *In re Reno*, 55 Cal. 4th 428, 443, 514-515, 283 P 3d 1181, 1195, 1246 (2012). Nor is the number of conceivable claims that may be brought to federal habeas corpus substantially reduced by the federal question requirement. Federal constitutional law has now intruded so pervasively into criminal procedure that "[f]ederalization is usually very easy " M. May, How To Get Ahead In Federalizing 1 (2010), http://capcentral.org/procedures/federalize/docs/federalization_100421.pdf. It does not follow, though, that appellate counsel should load up the direct appeal brief with every conceivable federal claim. Most of these claims have a chance of success somewhere between microscopic and zero.

In *Jones* v. *Barnes*, 463 U. S. 745 (1983), this Court emphatically rejected the notion that effective assistance of counsel requires raising all nonfrivolous issues on appeal. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Id.*, at 751-752. The word "default" sometimes carries a connotation of a wrongful or at least negligent omission, but the criminal appellate lawyer who raises only a few issues and leaves the rest on the cutting room floor is doing exactly what this Court has said an effective lawyer should do. The issues in a criminal case *should* be winnowed as the case progresses down the line, and the appellate lawyer's decision to omit, and therefore default, the weak claims to focus on the strong ones is the entirely proper first step in the winnowing process.

Federal habeas review of state cases should be even more narrowly focused. It " 'is a guard against extreme malfunctions in the state criminal justice systems,' not

a substitute for ordinary error correction through appeal." *Harrington* v. *Richter*, 562 U. S. 86, 102-103 (2011) (quoting *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in judgment)). When a competent lawyer has determined in accordance with *Jones* v. *Barnes* that a claim is one of the weak ones that should be winnowed out, there has been no extreme malfunction. On the rare occasions when counsel incompetently fails to recognize and brief a claim that is contained in the trial record and that does involve an error so egregious as to constitute an extreme malfunction, federal law provides an exception to the procedural default rule. See *Edwards* v. *Carpenter*, 529 U. S. 446, 451 (2000).

When the exhaustion, procedural default, and deference rules are applied correctly as a coherent system, there should be little left to decide when the typical case reaches federal habeas corpus. The claims that counsel did not make on direct appeal (if contained in the record) or on the initial state habeas petition (if not) are defaulted and may not be considered absent "cause and prejudice," with ineffective assistance being one form of cause. The claims that were decided on the merits must be reviewed on the state court record, see *Cullen* v. *Pinholster*, 563 U. S. 170, 181-182 (2011), and denied except in the rare case that "the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U. S., at 103. The vast majority of claims should therefore be dismissed at the threshold, reserving the drastic remedy of federal collateral attack on a final state judgment for the rare cases of extreme malfunction of the state system.

Declaring a state procedural rule inadequate severely distorts this system. A defendant who believes that the federal courts will be more sympathetic to a claim actually has an incentive to *avoid* getting a state court decision on the merits, exactly the opposite of what the long-standing exhaustion rule seeks to achieve. Further, the federal district court must adjudicate on the merits *every* claim that was defaulted.

Opening the floodgates in this manner is an enormous waste of resources. Years after the trial, the federal district court must address claims that either were properly winnowed out and should not be litigated at all or should have been raised in the initial reviews of the case (direct appeal or initial habeas corpus in the trial court) and decided by courts that were already familiar with the case. In a world of limited resources, every dollar spent on one purpose is a dollar not spent on some other purpose. The federal courts generally, and indigent defense in particular, are chronically underfunded. See, *e.g.*, American Bar Association, Federal Court Funding (updated Sept. 10, 2015), http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/federal-court-funding.html. "Those resources are diminished and misspent if there is judicial disregard" for established limits on habeas corpus, including the procedural default rule. *Richter*, 562 U. S., at 91-92.

Is it a wise allocation of the funds in the already-deficient defense pool to adjudicate on the merits in federal court a claim such as Claim 11 in this case, contending that the Constitution of the United States was violated when someone asked a couple of jurors in a restroom which case they were sitting on? See App. to Pet. for Cert. 38a. Is the failure of the state courts to address and correct this supposed error the kind of "extreme malfunction" for which the drastic remedy of

federal collateral attack is made available? Of course not. This is precisely the kind of weak, bordering on frivolous, claim that the effective advocate described in *Jones* v. *Barnes* can and probably should leave on the cutting room floor. Having been abandoned on appeal, it should be permanently out of the case, barred in state court by the *Dixon* rule and barred in federal court by the procedural default rule. Where application of the rule would be unjust, exceptions are available for "cause and prejudice" and "fundamental miscarriage of justice," but Lee does not claim either in this case. See App. to Pet. for Cert. 7a, n. 4. This claim should have been dismissed at the threshold. The funds that have been spent litigating the adequacy of the state ground to date and the funds that will be spent litigating the merits if the Court of Appeals' decision stands would be better spent on more substantial claims, claims that competent counsel have considered substantial enough to assert all the way through the case.

B. Delay.

Although this is not a capital case, the same default rules apply to capital cases, at least for the time being.[7] The one thing that nearly everyone can agree on in capital litigation is that the extreme delay in resolving these cases is a travesty. Congress has decided that unreasonable delay is a violation of the rights of the

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7. Chapter 154 of title 28 has a separate default rule for states certified under it, see 28 U. S. C. § 2264(a), but implementation of that chapter has been blocked by an injunction issued by a court of dubious jurisdiction. See *Habeas Corpus Resource Center* v. *Dept. of Justice*, No. 13-4517, 2014 U. S. Dist. LEXIS 109532 (ND Cal., Aug. 7, 2014), appeal pending, No. 14-16928 (CA9). An *amicus* brief on behalf of Marc Klaas and Edward Hardesty written by CJLF in this case is available at http://www.cjlf.org/briefs/HCRC_9th.2015.Amici.pdf.

victims. See 18 U. S. C. §3771(a)(7), (b)(2)(A). It enacted the habeas chapter of the Antiterrorism and Effective Death Penalty Act of 1996 primarily to reduce that delay, see *Rhines* v. *Weber*, 544 U. S. 269, 276 (2005), though its purpose has been frustrated by massive resistance. See, *e.g.*, *Richter*, 562 U. S., at 92, ("judicial disregard"); *White* v. *Woodall*, 572 U. S. __, 134 S. Ct. 1697, 1701, 188 L. Ed. 2d 698, 703 (2014) ("disregarded the limitations of 28 U. S. C. § 2254(d)"); *White* v. *Wheeler*, 577 U. S. __ (No. 14-1372, Dec. 14, 2015) (slip op., at 8) ("this Court again advises the Court of Appeals" that it is required to obey the law). Some believe that the delay is a violation of the rights of the defendants. See *Valle* v. *Florida*, 564 U. S. __, 132 S. Ct. 1, 180 L. Ed. 2d 940 (2011) (Breyer, J., dissenting from denial of stay). From either viewpoint, delay needs to be reduced.

Cullen v. *Pinholster*, *Harrington* v. *Richter*, and *Walker* v. *Martin*, if properly implemented and not evaded with cramped interpretations, would go a long way to reducing the delay. As described earlier, the vast majority of claims can be and should be dismissed at the threshold of federal habeas corpus. Few claims that state court decisions on the merits are unreasonable even come arguably close to the high bar of *Richter* *Pinholster*, properly understood, requires the §2254(d) issues to be decided on the pleadings and record, eliminating any need for discovery. *Martin*, properly understood, makes nearly all state procedural rules in force today "adequate" as applied in nearly all cases. A caveat is needed for the historically important but now rare-to-nonexistent case of discrimination against federal rights. See *Martin*, 562 U. S., at 321. Another is needed for the " 'limited category' of 'exceptional cases' " described in *Martin*, at 316, n. 4. For the great bulk of cases, though, adequacy of the state

ground should be so clear as to not even be a substantial issue.

Every habeas case should begin with a clearing of the underbrush. Every claim resolved by the state court on the merits in a decision that is either correct or debatable (which will be nearly all of them) should be out of the case. Every claim defaulted in state court should be out unless there is a substantial argument of one of the rare "adequacy" grounds, cause and prejudice, or fundamental miscarriage of justice. That will be most of them. If no claims remain, as should often be the case, the petition may be denied. If a few remain, the case can proceed focused on those few. That is why Congress decided that 450 days is sufficient to resolve a capital habeas case in district court from filing to final decision. See 28 U. S. C. § 2266(b)(1)(A). That kind of timeliness is entirely achievable if the limits on the issues to be litigated are respected and not evaded.

III. The decision in this case could be reversed summarily.

Amicus CJLF would prefer to see this case taken up for full briefing and argument. In that manner, it could be a vehicle for bringing some clarification to an area of law badly in need of it, as our earlier briefs in *Kindler* and *Martin* have explained in some detail.

However, if the Court does not have room on its crowded docket of full-review cases, this case could also be dealt with summarily. No new law needs to be made to reverse the Ninth Circuit's erroneous decision. The law is already stated as plain as day in *Walker* v. *Martin*, 562 U. S., at 319. A state court rule is not inadequate "because a court may opt to bypass [the rule] and summarily dismiss a petition on the merits, if that is the easier path." All that is needed is to confirm

what already should be obvious to all reasonable jurists, that this rule applies across the board to all state procedural default rules, whether they be characterized as "mandatory" or "discretionary." Regularly followed merely means invoked regularly enough to give fair notice. *Bennett* v. *Mueller*, 322 F 3d 573 (CA9 2003), was effectively overruled by *Martin* and should no longer be considered to have any precedential value. California's *Dixon* rule is "adequate" and should be respected in all cases where it has been applied since at least 1953. A *Dixon*-barred claim should be dismissed in federal habeas corpus unless the petitioner can establish cause and prejudice or actual innocence.

All of this is obvious on a fair reading of *Martin*. While error correction may not be a primary function of this Court, an error with such major impact on the adjudication of criminal cases in the Nation's largest state does warrant correction. Further, as rules similar to *Dixon* are common throughout the country, this issue is one of nationwide importance.

CONCLUSION

The petition for a writ of certiorari should be granted. The case should be set for full briefing and argument, or alternatively the Court of Appeals' decision should be summarily reversed and the District Court's decision dismissing claims as *Dixon*-barred should be reinstated.

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Respectfully submitted,

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